

269

# TRANSCRIPT OF RECORD

---

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 249 >

HENDERSON WATER COMPANY, APPELLANT,

THE CORPORATION COMMISSION OF THE STATE OF  
NORTH CAROLINA, WM. T. LEE, GEO. P. PELL, ET AL.,  
ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF NORTH CAROLINA

---

FILED JANUARY 13, 1926

(30,816)

Feb 14 1925 - 1925



(30,816)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 851

HENDERSON WATER COMPANY, APPELLANT,

*vs.*

THE CORPORATION COMMISSION OF THE STATE OF  
NORTH CAROLINA, WM. T. LEE, GEO. P. PELL, ET AL.,  
ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF NORTH CAROLINA

INDEX

	Original	Print
Record from the district court of the United States, eastern district of North Carolina.....	<i>a</i>	1
Petition for appeal.....	<i>a</i>	1
Order allowing appeal.....	<i>b</i>	1
Bond on appeal..... (omitted in printing) ..	<i>c</i>	2
Citation and service..... ( " " " ) ..	<i>d</i>	2
Caption ..... ( " " " ) ..	1	2
Bill of complaint.....	2	2
Stipulation re printing of franchise.....	20 <i>a</i>	17
The Henderson Water Co. franchise.....	20 <i>b</i>	17
Exhibit B—City ordinance of August 22, 1921.....	21	25
Subpoena (a) and marshal's return.....	24	26
Subpoena (b) and marshal's return.....	26	27
Subpoena (c) and marshal's return.....	28	28
Answer of the Corporation Commission of North Carolina..	30	29
Answer of the City of Henderson and others.....	35	33
Answer of City of Henderson to motion.....	45	39

	Original	Print
Notice of motion for interlocutory restraining order.....	43	38
Order denying motion for injunction.....	47	40
Motion of complainant for interlocutory injunction.....	48	41
Order setting hearing for motion for interlocutory injunction .....	49	42
Motion for restraining order.....	51	43
Answer of City of Henderson to motion for interlocutory injunction .....	52	43
Affidavit of Mrs. Effie K. Milne.....	59	48
Mrs. Mary B. Matthews.....	61	50
J. P. Renn.....	62	51
R. W. Robertson.....	63	51
J. L. Ludlow.....	64	52
E. B. Heimbach.....	66	53
A. F. Bailey.....	67	54
J. H. Bridgers.....	68	54
Order denying application for injunction.....	72	57
Assignment of errors.....	74	58
Præcipe for transcript of record.....	76	59
Order to transmit record.....	78	60
Clerk's certificate.....	79	61



[fol. a] **IN UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NORTH CAROLINA, AT  
RALEIGH**

In Equity

HENDERSON WATER COMPANY, Complainant,

vs.

THE CORPORATION COMMISSION OF THE STATE OF NORTH CAROLINA,  
Wm. T. Lee, Geo. P. Pell, A. J. Maxwell, Commissioners; R. O.  
Self, Clerk; James S. Manning, Attorney General; City of Hender-  
son, S. R. Chavasse, Mayor; M. N. Parrish, J. T. Elmore, Sr.,  
W. D. Burwell, R. E. Clements, W. H. Grissom, James W. Jenkins,  
W. A. Hunt, S. G. Walters, Aldermen; S. B. Burwell, City Clerk;  
B. H. Perry, City Attorney.

PETITION FOR APPEAL—Filed January 1, 1925

To the Hon. Chas. A. Woods, United States Circuit Judge, sitting by  
designation in the United States District Court for the Eastern  
District of North Carolina:

The above named Henderson Water Company, feeling aggrieved  
by the decree rendered and entered in the above entitled cause on  
the 27th day of September 1924, does hereby appeal from said decree  
to the Supreme Court of the United States for the reasons set forth  
in the assignment of errors filed herewith, and prays that its appeal  
be allowed, and that citation be issued as provided by law, and that  
a transcript of the record, proceedings, and documents upon which  
said decree was based, duly authenticated be sent to the Supreme  
Court of the United States, sitting at Washington, under the rules of  
such Court in such cases made and provided.

And your petitioner prays that the proper order relating to the  
required security to be required of it be made.

December 19th, 1924.

Henderson Water Company, By James H. Bridgers, Solicitor  
for the Complainant.

[File endorsement omitted.]

[fol. b] **IN UNITED STATES DISTRICT COURT**

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 1, 1925

On motion of J. H. Bridgers, Esq., Solicitor of and Counsel for  
Complainant, it is hereby ordered that an appeal to the Supreme

Court of the United States from the decree filed and entered herein on September 27th, 1924, be and the same is hereby allowed; and that a certified transcript of the record, exhibits, stipulations and all proceedings be forthwith transmitted to said Supreme Court of the United States at Washington, D. C.

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred (\$500.00) Dollars.

December 12, 1924.

C. A. Woods, United States Circuit Judge.

[File endorsement omitted.]

---

[fol. c] BOND ON APPEAL FOR \$500—Approved and filed January 1, 1925; omitted in printing

---

[fol. d] CITATION—In usual form, showing service on Perry & Kithel et al.; Filed January 1, 1925; omitted in printing

---

[fol. 1] CAPTION—Omitted

[fol. 2] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed Feb. 22, 1924

The Corporation Commission of the State of North Carolina, Wm. T. Lee, Geo. P. Pell, A. J. Maxwell, Commissioners; R. O. Self, Clerk; James S. Manning, Attorney General; City of Henderson, S. R. Chavasse, Mayor; M. N. Parrish, J. T. Elmore, Sr., W. D. Burwell, R. E. Clements, W. H. Grissom, James W. Jenkins, W. A. Hunt, S. G. Walters, Aldermen; S. B. Burwell, City Clerk; B. H. Perry, City Attorney, Defendants, to the Honorable the Judges of the United States District Court for the Eastern District of North Carolina, Sitting in Equity:

The Henderson Water Company brings this its bill of complaint against the Corporation Commission of North Carolina, W. T. Lee, Geo. P. Pell and A. J. Maxwell, Corporation Commissioners of North Carolina, R. O. Self, as Clerk and as an individual. James S. Manning, Attorney General of the State of North Carolina and the City of Henderson Vance County in said State. S. R. Chavasse, Mayor, M. N. Parrish, J. T. Elmore, Sr., W. D. Burwell, R. E. Clements, W. H. Grissom, James W. Jenkins, W. A. Hunt, and S. G. Walters, Aldermen, and as individuals. S. R. Chavasse as an

individual and Mayor, S. B. Burwell, as an individual and City Clerk, B. H. Perry as an individual and City Attorney.

## I

Complainant, Henderson Water Company is a corporation created by and existing under the laws of the State of North Carolina having its principal office in the City of Henderson, in the County of Vance in said State and in the Eastern District thereof. Said W. T. Lee, Geo. P. Pell and A. J. Maxwell, R. O. Self and James S. Manning [fol. 3] are citizens of the State of North Carolina and have their official residences in and are as members of the said Corporation Commission of the State of North Carolina, residents and inhabitants of the Eastern District thereof, although for the purpose of their political rights they retain the same at their former places of residence in the Western District of said State.

Said A. J. Maxwell and James S. Manning are citizens and inhabitants of the Eastern District of said State.

## II

The City of Henderson is a municipal corporation under the laws of North Carolina in the County of Vance in the Eastern District of said State, and the said S. R. Chavasse, Mayor, M. N. Parrish, J. T. Elmore, Sr., W. D. Burwell, R. E. Clements, W. H. Grissom, James W. Jenkins, W. A. Hunt, S. G. Walters, Aldermen, S. B. Burwell, City Clerk, and B. H. Perry, City Attorney, are all residents of the Eastern District of North Carolina.

## III

The Defendant Corporation Commission of the State of North Carolina is a body created by Legislature of said State invested with various regulatory powers over various public utilities including Water Companies. Said Commission possesses enumerated Legislative and General administrative powers over Water Companies. The domicile of the said Corporation Commission is in Wake County and for the purposes of jurisdiction it is a citizen of the State of North Carolina and resides in the Eastern District thereof. The Defendants, W. T. Lee, Geo. P. Pell, A. J. Maxwell, R. O. Self and James S. Manning, are all citizens of the State of North Carolina, and residents and inhabitants and for the purposes of jurisdiction, are citizens of the State of North Carolina and residents of the Eastern District of said State.

## IV

The City of Henderson is a municipal corporation and has enumerated Legislative powers and also certain corporate and proprietary powers. The domicile of the said City of Henderson is in the County of Vance and for the purpose of jurisdiction it is a resident of the Eastern District of North Carolina. S. R. Chavasse, Mayor, M. N. [fol. 4] Parrish, J. T. Elmore, Sr., W. D. Burwell, R. E. Clements,

W. H. Grissom, James W. Jenkins, W. A. Hunt, S. G. Walters, Aldermen, S. B. Burwell, City Clerk, and B. H. Perry, City Attorney are citizens of the State of North Carolina, residents of the Eastern District of North Carolina.

## V

This suit together with the controversies upon which it is based is of a civil nature and arises under the constitution and laws of the United States.

## VI

The amount involved in said suit, and in the controversies between Complainant, and the Defendants is more than \$3,000 exclusive of interest and cost.

## VII

Complainant shows that it is chartered for the purpose of carrying on the business of a public water supply for domestic purposes and for fire protection, and it and its predecessors in interest had established and maintained for more than thirty years a very large and complete system of Water Works, in what has now grown to be the City of Henderson, and adjacent territory, supplying water for domestic purposes, and through fire hydrants for fire protection, and maintaining its hydrostatic pressure on several automatic sprinkler systems.

## VIII

Complainant shows that its Water Works plant was built under specifications prepared at the instance of the Town of Henderson, now the City of Henderson by corporate name, all of which and the same were built, maintained and operated in accordance with an ordinance of the then Town of Henderson originally adopted in the year 1890 and re-enacted on March —, 1892, and the franchise and all rights, privileges and property therein, is now the sole property of Complainant, a copy of said franchise in its printed form and as published by the City of Henderson in its official code will be exhibited upon the hearing of this cause.

[fol. 5]

## IX

The Complainant shows that its earnings on the business done under and by virtue of said franchise, have at no time yielded to its affair and reasonable return upon the fair and reasonable value of its property, used and useful, in the operation of the public water supply of the City of Henderson and adjacent territory.

## X

That since the adoption of the said ordinance franchise by the City of Henderson, and the acceptance thereof, in the year 1890 the State of North Carolina granted in the year 1899 to the State

Board of Health of said State the power and authority to require the Complainant and all other operators of public water supply to build, maintain and operate a system of purification of the water furnished and supplied to the public, and that the annual cost of maintaining said system of purification is as near as the Complainant can determine now, as much as \$10,000 per annum.

This exercise of this police power of the State was not contemplated by the parties in the year 1890, and was an unknown art, and while the sum is a most wise and wholesome regulation, the Complainant is performing said duty without compensation, and its property is being gradually consumed thereby, and without just compensation, for the service rendered.

## XI

Complainant began its present corporate existence as of August 1st, 1894, having acquired the unfinished and incomplete Water Works system just prior thereto. At this time the Town of Henderson had no sewer system and for several years very little water was consumed and the expense of operation was small. This condition continued till about the beginning of the year 1905 when a partial sewer system was installed. Complainant undertook to operate under the so-called flat or fixture rates contained in the aforesaid franchise ordinance, but the waste of water under the same was so great that after several years of trial, Complainant was compelled to install a meter system for all consumers, having over one faucet, or any connection with the sewer.

[fol. 6] In order to induce the fullest use of the water complainant established a graduated system of rates slightly below those contained in the ordinance and operated thereunder for a period of five years.

On July 1st, 1917 complainant published notice that it was compelled to adopt the maximum rate provided for in the said ordinance, and operated thereunder until the first day of April 1923.

The City of Henderson, in September 1922 began an extensive system of street paving, and has passed various ordinances requiring the complainant to extend its mains on all streets on which it had ordered paving. There are very few residences on a great many of these streets, and the complainant has secured less than ten consumers not here-to-fore supplied, or which it could supply by reason of the several thousand feet of main laid, aggregating a total cost for the past Thirty Three months of \$60,000. The only additional income accruing to complainant from this large investment is for hydrant rental, which was at the rate of \$35.00 prior to April 1st, 1923, and is now at the rate of \$38.50 per annum on a direct investment of \$700.00 per hydrant being slightly in excess of 5% per annum, out of which operation, all local taxes and federal taxes must be paid. The complainant verily believes that the said return is confiscatory of its property and is gradually consuming it in violation of Section 1 of the 14th Amendment of the Constitution of the United States which provides:

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law."

## XII

That in the summer of 1921 on account of a deficiency in rainfall of more than 70% of the normal, for a period of five months in the section of the State between Littleton, N. C., and Salisbury, N. C. and on account of a leak at the bottom of the Defendants storage lake there was an apparent shortage of water in storage, and the month of August 1921 the City of Henderson adopted an ordinance which would require the complainant to spend large sums of money. [fol. 7] Complainant has been able to locate and stop the leak at the bottom of its reservoir, which caused the apparent shortage of water, and has purchased an additional source of water supply, and has brought any waste from its original source, and the new source together, and not-with-standing the intense drouth of the summer of 1923, and the published notices in the newspapers of the shortage of water prevailing at Durham and at Raleigh, and elsewhere, the complainant had at all times a large surplus supply.

This additional source of supply is an additional investment not contemplated under the ordinance franchise, and is an extra precaution and investment by the Complainant, which is used and useful to the public, and on which no return has ever been received.

## XIII

In view of these situations, and the condition existing with respect to the rates for service contained in the original franchise, Complainant applied to the City of Henderson requesting that it join with the Complainant in asking the said Corporation Commission of the State, to establish a schedule of rates that would yield a fair return on the property of the Complainant used by and useful for the public, said lack of return being due to the requirement of filtration and purification, to the purchase of the additional source of supply to the extensions of mains ordered by the City.

The City of Henderson refused to join in the application to the Corporation Commission to establish a schedule of rates slightly in excess of those named in the franchise.

## XIV

In September 1922 the Complainant filed a petition with the Corporation Commission setting forth the original cost of construction of the Henderson Water Works, the amount expended in permanent improvements thereon, the present cost of construction of the Henderson Water Works, the sum required to meet the operating expenses of the Henderson Water Works, and the probable earning capacity of the same under a schedule of rates proposed, and also

showing the confiscatory nature of the rates in effect. The City of Henderson was notified of said application, and joined issue before the Corporation Commission, and the same was heard in December 1922. On March 29th, 1923 the Commission made the following order:

"After full hearing of testimony and consideration of argument set out in brief, we find the following schedule of rates to be reasonable rates to be charged by the Petitioner, the Henderson Water Company.

Rates in Cents per 100 Cu. Ft. per Month

From 400 Cu. Ft. to 4,000 Cu. Ft.....	35 Cents.
From 14,000 " " " 12,000 " " .....	30 "
From 12,000 " " " 20,000 " " .....	22 "
Over 20,000 " " " .....	18 "

The schedule of rates now charged by the Petitioner for hydrant service may be increased ten per cent."

On April 9th, 1923, it made a supplemental order bringing forward the sprinkler rates and private fire protection which it had approved in October 1921, and establishing certain administrative and service charges. Both of which are fully set out in paragraph XV.

XV

The Complainant put into effect the rates authorized by the order of March 29th, and April 9th, 1923. Persons not parties to the hearing gave notice of appeal from the order authorizing sprinkler service, and caused the same to be docketed in the Superior Court of Vance County. Other parties complained to the Commission that the Complainant was not entitled to charge for each block of consumption of water named in the aforesaid rate; but that consumers were entitled to be charged at the lowest rate for the maximum quantity of water consumed. The Corporation Commission gave complainant notice of said complaints, and thereafter on July 27th 1923 entered the following order:

"The Commission having further considered this application, the Henderson Water Company is hereby ordered to reduce the number of cubic feet per block, and to put into effect for bills rendered for service from and after the month of July 1923, subject to complaint and hearing after the expiration of six months, as follows:

Monthly Rates in Cents per 100 Cu. Ft.

From 400 Cu. Ft. to 4,000 Cu. Ft.....	@ .35
Next 4,000 " " .....	@ .30
Next 4,000 " " .....	@ .25
After 12,000 " " .....	@ .18





said mains being at this time as near as Complainant can now ascertain, \$175,000. The Complainant suggests that it should be allowed to charge and earn, keep and set aside in cash, to be compounded for this purpose, for the benefit of Complainant, and its consumers, the sum of two per centum per annum on said \$175,000.

### XVIII

At the hearing before the Corporation Commission, Complainant filed with the Commission a new schedule of rates and charges as follows:

For the first 10,000 Cu. Ft. Per Mo	.....	35¢	per 100 Cu. Ft.
For the next 10,000 " " " "	.....	30¢	" " " "
All over 20,000 " " " "	.....	25¢	" " " "

The same to be subject to the following minimum charges for which consumption will be allowed, payable monthly.

For ½ Inch Connection by ½ Inch Meter Minimum	.	400 Cu. Ft.
For ¾ " " " ¾ " " "	.	500 " "
For 1 " " " 1 " " "	.	800 " "
For 2 " " " 2 " " "	.	2,000 " "

The foregoing schedule to be subject to a discount of 4% for prompt payment and subject to a collection charge of 25¢ per month for each month any bill remains unpaid.

For all 2-½ inch fire hydrants for public or private use \$60.00 per annum payable monthly, provided that not more than 400 feet of main is required, and for any main in excess of 400 feet per hydrant, to be charged for at the rate of 1¢ per foot per month.

For pressure on automatic sprinklers where Complainant furnishes the only source of supply \$6.00 per annum per 1,000 square feet of floor space, and where there are two sources of supply \$3.00 per 1,000 square feet of floor space.

For 1-½ Inch inside fire hose connections \$12.00 per annum; and that the order of the Commission set forth that the limit of liability of the Complainant for damages should be as provided in section 2807 of the Consolidated Statute of North Carolina, in the same manner as if the City owned the Water Works.

[fol. 11]

### XIX

The City of Henderson strenuously resisted the adoption of said schedule of rates and the same were not allowed, but instead and in lieu thereof, the final order of July 27th, as set forth in Section XV of this bill was promulgated.

### XX

Complainant shows that the allegations set out in its petition filed with the Corporation Commission were and are true and that the same

was sustained by conclusive proof at the hearing before said Commission, and that the only evidence offered by the Respondent, City of Henderson, admitted the correctness of the inventory filed by this Complainant, and the only difference in value being that the City of Henderson contended that a large sum for depreciation should be set up against the property of the Complainant, notwithstanding the fact the Complainant had never earned a fair return on its property, had never set up, earned or charged any depreciation.

## XXI

The Complainant further shows that at the hearing before said Commission that it filed with said Commission an itemized statement by years showing investment of the Henderson Water Company at actual cost of the property, the interest on the same at 6% per annum and that the amount of interest actually paid the owners from Jan. 1st, 1895, to Dec. 1st, 1921, and that it should have earned and paid out during that period \$197,074, whereas, in truth and in fact it had only paid out to its owners the sum of \$71,198.

## XXII

The Complainant further shows that in order to continue to furnish a complete and adequate service to consumers of water and fire protection, and to provide the necessary additional facilities to filter the same, and provide an additional motor driven pump in reserve, Complainant will be required to procure and expend within the next two years approximately the sum of \$20,000. It will complete the first unit of this filter plant and have the same in operation unless delayed by unforeseen causes by July 1st, 1924.

[fol. 12] Complainant is informed that all waste of water from its reservoir may be stopped by the addition of an 8 to 10 inch reinforced concrete slab the entire length and width of its dam at its reservoir. This work must be done while the reservoir is practically full of water operating conditions and will cost as near as Complainant can estimate, the sum of \$5,000. Both of the above improvements will be non-revenue producing, but Complainant verily believes they should be completed as early in the year 1925 as practical, in order that Complainant may be able to withstand any sudden and unexpected demand for water, and in order that the public water supply for the City of Henderson may have a large reserve capacity at all times.

## XXIII

The funds for this construction cannot be secured under the rates authorized in the order of the Corporation Commission of July 27th, 1923, as set forth in paragraph XV of this bill of complaint.

Complainant has obtained the necessary capital for making the extensions ordered by the City of Henderson, by creating and selling at par \$40,000 par value of its First Preferred 8% Capital Stock, shares for which entitle the holder thereof to a first preference in its earnings and of its assets in case of liquidation or distribution.

## XXIV

Complainant further shows that it has now in use and under construction and useful and necessary for supplying its consumers and the public with water for all domestic and industrial purposes and for fire protection, a large well designed Water Works plant, rendering highly efficient service and that the value thereof as of December 31, 1923, is in excess of \$300,000. It has never in the 29 years of its existence earned an adequate, reasonable and fair return upon the fair and reasonable value of its property, used and useful in supplying water for such service.

## XXV

During no year have the net earnings of the Complainant ever been as much as Five per cent on the value of its property, and that its net earnings at the present time on the fair value of its property, [fol. 13] after the utmost economy in operation, and without any expense whatever, for the salaries of strictly executive officers, and after paying its employees slightly less than is paid for similar service in the community, it will earn less than Four per cent upon the fair and reasonable value of its said property, and that it will earn less than Six per cent upon its original cost.

## XXVI

Complainant further shows that it is being subjected to expensive litigation by persons claiming to appeal from the order of the Corporation Commission to the Superior Court of Vance County, although said persons were not parties to the hearing before the Corporation Commission. Other persons are paying bills under protest, and are claiming that Complainant has no right to charge even the rates established by the Corporation Commission, but that it is bound to continue to supply service at the rate named in the original ordinance, notwithstanding the fact that Complainant has been and is required by law to supply and operate a complete system of filters for purification; has recently installed several thousand feet of main under the orders of the City of Henderson, has purchased another source of water supply and is increasing its filter capacity by an additional investment of \$30,000. The City of Henderson has also given notice that it would appeal from the order of the Corporation Commission, and is attempting to subject Complainant to further expense.

Complainant has put the rates and charges authorized in the order of July 27th, 1923, of the Corporation Commission, and in accordance with its oral suggestion corrected the charges to every consumer who had paid the rates named in the original order.

If Complainant is required to continue to charge said rates, the same will confiscate its property, in violation of the 14th Amendment of the Constitution of the United States now and hereinbefore invoked.

## XXVII

The original ordinance under which the Water Works were constructed provided that water for the public schools would be in the then corporate limits of the City of Henderson should be furnished [fol. 14] free of charge to said schools, at the time said ordinance was enacted school did not use any water; since that time a complete system of public school buildings have been built, with most complete system of sanitary closets, and the value of water consumed in said schools is more than \$1,000 per annum. Complainant shows and avers that water for public schools should be paid from public taxation, and the same is an unjust burden upon the Complainant, having regard to the conditions under which it operated; that the water used for said schools should be paid for from taxes, and this Complainant should not be longer required to furnish the same free of charge, and to require Complainant to continue to do so, deprives Complainant of its property without compensation, without due process of law, denies to it the equal protection of the laws, violates the 14th Amendment of the Constitution of the United States, hereinbefore quoted, and now invoked.

## XXVIII

That Complainant has no adequate remedy at law and should it fail to observe the rates and charges specified in the order of the Corporation Commission set out and the ordinances of the City of Henderson referred to in paragraph XII, and hereto attached as exhibit "B" or should collect any rates and charges higher than those specified in the order of July 27th, 1923, or any rates not authorized by said Corporation Commission, the defendants will, unless restrained by the order of this Court, institute and cause to be instituted proceedings to compel Complainant to charge the rates promulgated by said Commission and the City of Henderson will institute proceedings to compel it to carry out the ordinance hereto attached as exhibit "B." Complainant, its officers, agents and employees will be deterred and prevented by the burden of fines from putting into effect any other schedule of rates, and incur the penalties and punishments, prescribed by the laws of the State of North Carolina, and if the same are enforced would destroy the property of this Complainant. The City of Henderson has the power under its Legislative charter, to-wit: Chapter 332 of the Private Laws of 1913 as contained in Section 18 thereof to institute legal proceedings, to take over the property of Complainant and use the same and to apply whatever earnings Complainant may have, and make such extensions and improvements as in the judgment of the City Council may seem needful and just, to the irreparable damage of Complainant.

That unless the Defendants are restrained, and enjoined, as herein prayed Complainant, its officers, agents and employees will be deterred and prevented by the burden of enormous and excessive fines from putting into effect any schedule of rates and charges in excess of those recited in the order of the Corporation Commission

of July 27th, 1923 and Complainant will thereby be forced to submit to the confiscation of its property without due process of the law and in violation of its rights under the Constitution of the United States; that unless Defendants are restrained and enjoined as herein prayed, Complainants consumers, and other parties, will be induced to resist any rates and charges other than those provided in either the original ordinance franchise, or those authorized by the Corporation Commission's order.

### XXIX

That because of the nature of the business of Complainant and the small sums of money due monthly from each of its consumers, and patrons, it is impractical for the Complainant to collect by law, and unless Complainant can immediately and promptly receive its income monthly, it will be impossible for it to perform the public service required of it. Complainant is unable to enforce and collect its charges except by demanding deposits in advance or discontinuing its service, and Complainant believes and charges that if it undertakes to demand any charge higher than those contained in the ordinance franchise in some cases, and the Commission's order in other cases, that various persons will attempt to restrain Complainant from cutting off its service for non-payment and for damages and Complainant will thereby be subjected to numerous suits, its property will be confiscated to its irreparable loss and damage.

### XXX

Complainant further shows that the North Carolina Corporation Commission did not consider the value of the Complainant's property at the time of the inquiry, as the Complainant is informed, believes and avers, it was in duty and law required to do, but that [fol. 16] the Commission only considered the absolute cost of Complainant's property, and as to that, it applied the rule of theoretical depreciation.

Complainant shows and avers that it is entitled to have a fair return upon the value of its property at the time of the inquiry, and that its — entitled to have the independent judgment of this Court, both as to the law and the facts, as to any rates fixed by the North Carolina Corporation Commission, and to have the City of Henderson as a municipal corporation, restrained from in any way interfering with Complainant in securing the independent judgment of this Court on the subject matter set forth in this bill of Complaint.

### XXXI

Complainant shows that the increase allowed by the Corporation Commission of North Carolina was only 10% upon its hydrant rental, and the small additional charge amounting to less than \$1,000 per annum for its sprinkler service, and that the net increase which Complainant charges to household consumers and consumers

for small commercial use is only 12- $\frac{2}{3}$  and to large commercial consumers from 11% to 33%, so that the total increase allowed to Complainant does not yield to it over 12% in gross income.

Complainant shows and avers that it is entitled to have its income increased in order to earn a fair return upon the value of its property at this time, of not less than \$12,000 per annum.

### XXXII

Since the hearing before the Corporation Commission in December, 1922 Complainant has under the orders of the City Council of the City of Henderson, added to its property, used and useful to the public, more than \$25,000 in value and that its increase of revenue therefrom is not in excess of \$6,000.00 per annum and that it must add within the next twelve months as much as \$25,000 more, in order to have the large reserve supply of stored water, and filtered water, as some sudden emergency may require. Complainant is fully prepared and financially able, to supply the same provided, only that it is permitted to earn a fair return upon the investment.

[fol. 17]

### XXXIII

The Complainant operated its property during the year 1923 with the greatest possible economy and received a gross income therefor of \$42,393.00. If the rates allowed by the Corporation Commission had been effective for the first three months of the year it would have received a gross income of \$44,493.00. The operating expenses, including the increased property taxes, and Federal Taxes were \$27,972.00, leaving net, subject to depreciation, \$16,521.00. There must now be deducted from this for usual depreciation \$3,000.00 and for a reserve against inadequacy of mains which may accrue in the future, and which cannot be removed on account of paving, \$3,500.00, leaving your Complainant net \$10,021.00 on an investment of \$300,000 for the year 1923, being less than 4% upon the fair value of its property now used by the public for a public water supply.

### XXXIV

Complainant is informed and alleges and believes that it is entitled to have the present value of its property fixed and determined by the independent judgment of this Court, and that it is entitled to have a return of 8% per annum upon the present fair value of its property, after a reasonable amount shall be determined as its operating expense, a reasonable amount for depreciation, and a special reserve to be set apart as a fund to provide for the inadequacy, in size only, of its cast iron pipe distribution system, said inadequacy being occasioned only, by being made impractical by the City of Henderson to remove the cast iron pipe in its streets, when it should become inadequate, to a street where it will be adequate, on account of the concrete base of five inches or more used in paving said streets.



## XXXV

Complainant shows unto the Court that it is subjected to expensive litigation by the City of Henderson and there is now depending in the Superior Court of Vance County appeals by the City of Henderson from the orders of the Corporation Commission allowing the Complainant the small and inadequate increase in its [fol. 18] rates here-to-fore recited in this Bill of Complaint, and that the City of Henderson and its Counsel, has fostered and encouraged other patrons of the Complainant to join with it in said appeals, and the other patrons are represented by the same Counsel as represents the City of Henderson, notwithstanding the fact that two of the Appellants from the orders of the Corporation Commission are not tax payers within the City of Henderson, and their interest is adverse and in conflict with that of the City of Henderson and its citizens and the consumers of this Company.

## XXXVI

The Complainant has undertaken to compose its differences with the City of Henderson by negotiations, has offered to submit its books for examination to the authorities of the City of Henderson but all such suggestions and offers have been ignored by the defendant.

## XXXVII

Complainant is informed and believes and alleges that unless this Court shall issue a writ — injunction against the further prosecution of the appeals pending in the Superior Court of Vance County that this Court will lose jurisdiction of the subject matter of this action, and Complainant will be denied its rights under the Constitution of the United States which are again invoked, pleaded, and asked for of which this Court has jurisdiction, and unless the Court issue it writ of injunction immediately, it will be without power to enforce its decree, and complainant denied its constitutional rights.

The appeals referred to stand for trial on March 3rd, 1924, and under the statute of North Carolina providing for appeals from the Corporation Commission in the form of action now pending, although the property of Complainant is involved, and its value at issue, the Complainant is not a party to the proceedings, has no standing in said Court, its rights will be adjudicated without a hearing and its property taken and gradually consumed by confiscatory rates.

## XXXVIII

Complainant shows that unless it has relief from the orders of the Corporation Commission of North Carolina and relief from the [fol. 19] expense of the litigation imposed upon it by the City of Henderson and that a schedule of rates be established that will yield a fair return upon its property, its property will be confiscated without due process of law by authority of a power exercised under the State of North Carolina.

Wherefore your Complainant prays:

1. That writs of subpoena issue directed to the parties named as Defendants in this Bill, commanding the Corporation Commission and its members and the City of Henderson, and its governing members to appear and answer, but not under oath, answer under oath being waived, the allegations contained in the foregoing Bill of Complaint and to abide by and perform such orders.

X 2. That a writ of injunction issue under the seal of this Honorable Court to the Defendants named in the Bill directing, commanding and restraining them, and each of them from the further prosecution of the appeals now pending in the Superior Court of Vance County from the orders of the Corporation Commission.

Y 3. That a writ of subpoena issue directed to J. H. Brodic, a citizen and resident of Vance County in the Eastern District of North Carolina, to the Carolina Bagging Company, a corporation under the laws of the State of North Carolina, having its principal office in Vance County, to the Henderson Cotton Mills, a corporation under the laws of North Carolina, having its principal office in Vance County and to Messrs. Hicks & Son and Perry & Kittrell, Attorneys of record, and citizens and residents and Attorneys at Law in Vance County, and that with said writ of subpoena there issue a writ of injunction, under the seal of this Court directing, commanding and restraining the parties aforesaid from the further prosecution of their appeals from the orders of the Corporation Commission of the State of North Carolina in the Superior Court of Vance County.

4. That this Court proceed according to its custom and with such reasonable dispatch as it can conveniently do so, to fix the *the* [fol. 20] present value of the Complainant's property used and useful by the public and the probable earning capacity of such property under the orders of the Corporation Commission.

5. That the Honorable the Corporation Commission of North Carolina be decreed to establish a schedule of rates for the use of the property of the Complainant that will yield it a net return of 8% upon the present value of the property of your Complainant, after reasonable operating expenses, taxes imposed by law, and the necessary sum for depreciation and inadequacy.

6. That your Complainant have such other and further remedy in the premises as may be just and proper including its cost.

Henderson Water Company, by J. H. Bridgers, President.  
J. P. Zollicoffer, Solicitor for Complainant, Henderson,  
N. C.

[fol. 20a] AGREEMENT TO PRINT FRANCHISE AS PART OF RECORD—  
Filed Jan. 13, 1925

(Reference to Paragraph VIII, Bill of Complaint, Page 4, of this  
Transcript)

[Title omitted]

Mr. S. A. Ashe, Clerk United States District Court:

It is hereby agreed that the attached copy of the Henderson Water Works franchise may be printed as a part of the case on appeal to the Supreme Court of the United States.

This January 12th, 1925.

J. H. Bridgers, Solicitor for Complainant. B. H. Perry,  
of Counsel for City of Henderson et al.

[fol. 20b] THE HENDERSON WATER WORKS COMPANY FRANCHISE

Providing for a supply of water to the City of Henderson, county of Vance, State of North Carolina, and to its inhabitants contracting with A. H. McNeal, J. Whit Wood and W. L. Granger, and their associates, successors or assigns, for a supply of water for public use, and giving the said town of Henderson, option to purchase said works:

Be it ordained by the Mayor and Board of Town Commissioners of the said Town of Henderson the manner following; that is to say:

#### Section I

That for and in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted to A. H. McNeal, J. Whit Wood and W. L. Granger, their associates, successors or assigns, for a period of forty years from the passage of this ordinance, to construct, maintain and operate within and near the said town of Henderson a system of Water Works for supplying the said town and the inhabitants thereof and of the adjacent municipalities and territories, with pure and wholesome water for public and private uses, and to use the streets, alleys, sidewalks and public grounds, and the rivers, streams and bridges of the said town of Henderson within its present and future corporate limits for placing, taking up and repairing mains, hydrants and other structures and devices, requisite for the service of water from time to time during the period in which this ordinance shall be in force.

#### Section II

The said A. H. McNeal, J. Whit Wood and W. L. Granger associates, successors or assigns, shall exercise the greatest care and

diligence in the use of said streets, alleys and public places of the said town of Henderson, and shall cause no unnecessary stoppage of or interruption to the public travel over or upon the same or any injury to or interference with any pipes, mains or sewers, which may now be lawfully located beneath the surface thereof. They shall further take every precaution to provide against danger to life and limb by means of the exercise of the rights and privileges herein conferred, and shall cause all excavations and obstructions [fol. 20c] to be properly lighted and guarded at night, and after completion of the work to restore all streets, alleys or other public places as nearly as practicable to their former conditions without unnecessary delay. And the said A. H. McNeal, J. Whit Wood and W. L. Granger, and their associates, successors or assigns, hereby agree to hold the town of Henderson harmless from any liabilities which may result to it by reason of any violation of this section.

### Section III

The general plan of the said system of water works shall be as follows, viz:

**Source of Supply:** Shall be from Fox's pond, or adjacent thereto or from some other point if another source should be found expedient, but it shall not be adopted except by and with the consent of the Board of Town Commissioners of said town of Henderson.

**Pump House:** It shall be built of stone or brick, metal or slate roof and suitable size to contain the boilers and pumps of the water works system, and it shall be built as completely fireproof as practicable.

**Boilers:** There shall be two return tubular boilers, each of which shall have ample capacity to operate the pumping engines; they shall be set in a substantial and workmanlike manner and furnished with all necessary feed pumps, piping, water and steam guages, connections, and steam, water and smoke connections.

**Pumps:** The pumping machinery shall consist of two pumping engines of a capacity of two million gallons per twenty-four hours.

**Stand Pipe:** The standpipe shall be built of steel or best quality of boiler plate iron. It shall have a height of one hundred and thirty (130) feet above the level of the intersection of Garnett and Breckenridge streets and of a diameter sufficient to contain not less than one hundred and fifty thousand gallons, or in lieu of a stand pipe, thereby may be erected a tower tank, to contain not less than one hundred thousand gallons and of the same height as above prescribed for stand pipe, and tank to be placed on either stone, brick or iron towers.

**Gates and Valves:** The gates and valves shall be of the most approved pattern and will be located in the lines of the mains and laterals at such points as to allow extensions of the pipe system or repairing any part of the pipe system without cutting off the water from any large portion of the whole pipe system.

**Hydrants:** The hydrants shall be double nozzle, frost proof, fire hydrants, of the Ludlow, Matthews or other standard pattern

and will be located on the line of the street mains, located by a [fol. 20d] committee of said Board of Town Commissioners of the town of Henderson.

**Mains:** The pipe system shall consist of approximately seven and six-tenths miles of pipe, and reach all hydrants as outlined on tracing of town *may* by Wright & Wood. It shall be cast iron water pipe of size ranging from twelve (12) to four (4) inches in diameter, sizes to be distributed approximately as follows: Twelve-inch pipe from source of supply to stand pipe or tower tank.

Ten-inch pipe, approximately.....	3,000 feet.
Eight-inch pipe, approximately.....	3,500 feet.
Six-inch pipe, approximately.....	21,000 feet.
Four-inch pipe, approximately.....	6,500 feet.

The pipe shall be best quality of cast iron water pipe, of standard make and tested at their place of manufacture under a hydrostatic pressure of three hundred (300) pounds to the square inch, and coated with a preservative mixture of coal pitch, varnish, or asphaltum mixture of Prof. Augus Smith or other standard mixture. The street mains shall be located by A. H. McNeal, J. Whit Wood and W. L. Granger, and their associates, successors or assigns, by and with the consent of the said Board of Town Commissioners of the town of Henderson, and they shall be so located as to be most convenient and accessible for fire protection and private consumers. All costs and expenses for relaying pipes in consequence of a change of grade of any street shall be paid by the said town of Henderson.

#### Section IV

The said A. H. McNeal, J. Whit Wood and W. L. Granger and their associates, successors, or assigns, shall on or before the 15th day of March, 1892, file their written acceptance of this ordinance and all its terms in the office of the Town Clerk, and shall complete in good faith the construction of said works within sixty (60) days from the passage of this ordinance, and shall use all due diligence in the construction in all its parts, so that said works shall be completed within the time aforesaid: Provided, however, that any time which the said A. H. McNeal, J. Whit Wood and W. L. Granger, and their successors or assigns may be delayed by any act of God, floods, the public enemy, or legal proceedings for the maintenance of their rights, or the acquisition of property of right of way, or by injunction or order of court, or by reason of any other cause whatsoever beyond their control, shall not form part of the time limited in this ordinance for the performance of any act required of the terms hereof to be done by them.

[fol. 20e]

#### Section V

The said grantees shall set and connect to the system of mains not less than sixty-eight double opening fire hydrants of Ludlow or Matthews pattern, or others of approved standard make to be located as herein before provided in Section III.

## Section VI

In consideration of the benefits which will be derived by the said town of Henderson and its inhabitants from the construction and operating said water works, and in further consideration of the water supply hereby secured for public use, and as an inducement to the said A. H. McNeal, J. Whit Wood and W. L. Granger, successors or assigns; to enter upon the construction of said water works, this franchise and license is hereby granted to and vested in them exclusively and shall remain in full force and effect for the term of forty (40) years; subject to the right of purchase in this ordinance contained, and for the same consideration and as the same inducement, the said town of Henderson hereby rents of the said A. H. McNeal, J. Whit Wood and W. L. Granger, associates, successors or assigns, for the use hereinafter mentioned, the said sixty-eight (68) hydrants hereinbefore mentioned and provided, and during the term of forty (40) years from the completion of said works, the said town of Henderson agrees to use said hydrants only for the extinguishment of fires and necessary fire practice, except as hereinafter provided, and make good to the said grantees, their successors or assigns, any injury which may happen to any hydrant through the neglect of the said town, or any member of its Fire Department, and hereby promise to pay a rental for the said sixty-eight (68) hydrants of twenty-seven hundred and twenty dollars (\$2,720.00) per annum, which rent the town of Henderson promises and agrees to pay in two equal installments of thirteen hundred and sixty dollars (\$1,360.00) each on or before the first day of November and May in each and every year during the said term of forty years, to the said A. H. McNeal, J. Whit Wood and W. L. Granger, associates, successors or assigns, grantees.

## Section VII

The said town of Henderson shall at any time have the right to order the said grantees to extend the line of their mains, but as a consideration for such extensions which may from time to time be ordered laid, the said town of Henderson further promises and agrees to order the erection of fire hydrants at the rate of ten (10) hydrants per mile of such extensions, and to order no extension without ordering one or more hydrants, and to pay an annual rental of thirty-five [fol. 20f] (\$35) dollars for each hydrant so ordered and erected to the said grantees, payable on said terms and dates as the hereinbefore mentioned rental during the continuation of this ordinance. The said A. H. McNeal, J. Whit Wood and W. L. Granger, associates, successors or assigns, may voluntarily make such extensions at any time, in which case the said town of Henderson will not be required to order fire hydrants. The said town of Henderson shall have the right to cause to be erected and connected to the original line at any time such number of fire hydrants as said town of Henderson may from time to time require, for which the said town of Henderson promises and agrees to pay an annual rental of thirty dollars (\$30.00) each per annum, said rentals to be paid at the same time and in the

same manner as the hereinbefore mentioned hydrant rentals during the unexpired period of said term of forty (40) years. Should said town of Henderson fail to purchase said water works at the expiration of said term of forty years, then this ordinance shall be in full force and effect for a further and additional term of forty years, upon the same terms and provisions as herein provided.

### Section VIII

The said town of Henderson may further use the aforesaid hydrants for necessary fire practice, and for taking water therefrom for flushing gutters or other storm water sewers only: Provided, that no more than two hydrants shall be opened at one time, and not longer than ten minutes in any week. The said town of Henderson may further use the aforesaid hydrants for the purpose of sprinkling the main business streets of said town by carts owned and operated by said town, the charge for which privilege shall not exceed the amount of town tax on water works property.

Provided, however, that in no case except fire shall a hydrant be opened without first notifying and obtaining permission so to do from the office of the Water Works.

### Section IX

Water shall be furnished free of charge to five (5) drinking fountains with openings for man and beast, fixtures to be furnished by said A. H. McNeal, J. Whit Wood, W. L. Granger, associates or assigns, and one similar fountain to each twenty hydrants, subsequently located on mains ordered by said town of Henderson as provided for in Section VII. Also for churches, public schools, town offices, market houses for city use and all other town offices, now in use or to be erected. Also one ornamental fountain to be erected by said town of Henderson, or at their expense at such place on the line of mains as may be designated by the said town of Henderson: Pro-[fol. 20g] vided, however, that this clause shall not be so construed as to permit the carrying away of water from the fountains for private uses.

### Section X

Upon the completion of the construction of said system of water works, the said A. H. McNeal, J. Whit Wood, W. L. Granger, associates, successors or assigns shall so notify the said town of Henderson, and thereupon submit the works to a test, to be sufficient to throw (5) five streams through fifty (50) feet sections of two and one-half (2½) inch rubber hose and one (1) inch nozzle from five (5) different hydrants to a height of not less than seventy-five (75) feet, whereupon the work shall be formally accepted by said town of Henderson, as constructed in accordance with the terms of this ordinance, and from this time shall the herein mentioned hydrant rental begin.



## Section XI

After the works are put in operation if at any time the pressure be less than forty (40) pounds on the distribution mains for the period of two weeks in succession, then the rental for the use and employment of the hydrants for the purpose aforesaid shall cease until the standard of pressure provided shall be obtained: Provided, however, if the pressure indicated as aforesaid shall be less than forty (40) pounds for two calendar months in succession then all the rights and privileges of the said A. H. McNeal, J. Whit Wood and W. L. Granger, associates, successors or assigns acquired by virtue of this ordinance shall cease, determine and be null and void. But nothing herein contained shall be so construed as to prevent the said A. H. McNeal, J. Whit Wood and W. L. Granger, their associates, successors or assigns from temporarily shutting off the water from the said system or any portion thereof for the purpose of making repairs or extensions to the same, and no liability shall attach to the said A. H. McNeal, J. Whit Wood and W. L. Granger, their associates, successors or assigns, for the suspension of the supply of water further than rentals of hydrants so cut off: Provided, the repairs or extensions are made and the water turned on again without unnecessary delay.

## Section XII

Said A. H. McNeal, J. Whit Wood and W. L. Granger, their associates, successors or assigns may procure the organization of a water works company under the laws of North Carolina or may acquire an interest in such a company, and may assign to it all the rights and privileges herein granted, and the Mayor and Board of Town Commissioners of said town of Henderson shall pass and enact such other [fol. 20h] ordinances and do and perform such other acts including the repassage of this ordinance in favor of such corporation as may be necessary to vest in it, said corporation all the rights and privileges herein granted.

## Section XIII

The Mayor and Board of Town Commissioners of said town of Henderson shall from time to time pass and enact such ordinances together with fixed penalties as may be required for the protection of said water works from damage, fraud or imposition.

## Section XIV

The said A. H. McNeal, J. Whit Wood and W. L. Granger, their associates, successors or assigns shall not charge to consumers during the continuance of the franchise granted by this ordinance, exceeding the following maximum annual rates, payable quarterly in advance. But they shall have the right at their will to insert a meter into the service pipe of any consumer and to supply him at meter rates. Also any persons feeling themselves aggrieved by rates charged shall have the privilege of setting an accurate meter and paying the amount

indicated in a like manner, provided the amount used by meter shall exceed twelve dollars (\$12) per annum.

For a faucet in kitchen for domestic purposes only, for a house of four rooms or less .....	\$6.00
For each additional room .....	1.00
Offices or sleeping rooms .....	5.00 to 10.00
Oyster Saloons .....	10.00 to 20.00
Printing offices, 6 hands or less, engine extra .....	12.00
Printing office, each additional hand .....	1.50
Plastering, per 100 per square yards .....	.30
Stable, private, with water for carriage, washing two horses or less .....	10.00
Stables, private, each horse over two .....	1.50
Stables, private, each cow .....	2.00
Stables, livery, each stall up to 20 .....	2.50
Stables, each additional stall .....	2.00
Stationery steam engines of boilers, per horse power .....	6.00
Stores and shops .....	10.00 to 30.00
Tobacco factory (no license less than \$15) for each hand employed therein .....	.60
Urinals, self-closing, private .....	4.00
Urinals, self-closing, public .....	8.00
Water-closets, private .....	6.00
Water-closets, each additional, private .....	4.00
[fol. 20i] Water-closets, public .....	10.00
Wash basins, stationary, in dwelling .....	3.00
Wash basins, each additional to first faucet .....	2.00

#### Meter Rates per One Thousand Gallons

1,000 gallons or less per day .....	\$0.40
1,000 gallons to 3,000 per day .....	.35
3,000 to 5,000 per day .....	.25
5,000 to 10,000 per day .....	.20
Exceeding 10,000 gallons per day .....	.18
For sprinkling lawns with 3-16 inch orifice, per 250 square feet .....	3.00
Per 500 square feet .....	5.00

All matters of litigation that may arise between said town of Henderson and said water work company shall be tried in the court of the county of Vance or any county adjacent thereto.

#### Section XVI

At the expiration of ten years after the completion of said water works the said town of Henderson shall have the right to purchase the said water works at a price to be determined as follows, viz: Three disinterested appraisers shall be appointed, one by the said town of Henderson, one by A. H. McNeal, J. Whit Wood and W. L. Granger, associates, successors or assigns and the third to be appointed

by those two, all of whom shall be hydraulic engineers of recognized character and ability, and of a standing and reputation satisfactory in all respects to both said town of Henderson and said grantees and neither of whom shall be residents of Vance County, North Carolina, nor ever in the employ of or connected with or related to said grantees. The three appraisers thus appointed shall determine the value of said water works and shall fix and determine the actual value of every kind and description of property belonging to said system of water works, including all franchises and real estate and all other real values, estate and property and earning capacity of the works.

Provided, however, said town of Henderson shall have given to said grantees, their successors or assigns, one year's notice previous to expiration of said ten years, of the intention to purchase said works: And provided further, that the said town of Henderson shall well and truly pay in cash the appraised value to said grantees within six months after said appraisal shall have been made. A failure to pay shall operate as waiver of the right to purchase until the expiration of the next succeeding ten years, at which time of purchase if made it shall be upon appraisal and in the manner as herein provided.

[fol. 20] Should the said town of Henderson fail to purchase the said water works as herein provided, then the said town of Henderson shall pay the whole cost of such appraisal, the cost of which shall not exceed the sum of five hundred dollars (\$500).

Should the said town purchase the works, then the said grantees, their successors or assigns and said town shall each pay one-half of the cost of appraisal, but until the time of purchase of said water works by said town of Henderson, the privileges and agreements herein contained shall continue in full force and effect upon the said town of Henderson and upon the said grantees.

### Section XVII

The pump-house shall be connected with the office of the water works and the town by an electric alarm.

### Section XVIII

This ordinance shall become binding as a contract upon the said town of Henderson in the event that the said grantees shall on or before — day of March, 1892, file with the Town Clerk of the said town of Henderson their written acceptance of the terms, obligations and conditions of this ordinance, and upon the filing of the approved bond, in the sum of five thousand dollars (\$5,000) for the faithful completion of the said works within the time hereinbefore provided, and thereupon this ordinance shall constitute and become a contract and shall be the measure of the rights and liabilities of the said town of Henderson and the said grantees.

### Section XIX

Wherever in this ordinance any word or words, term or terms are used to designate or intended to designate the grantees, it is under-

stood to be A. H. McNeal, J. Whit Wood and W. L. Granger, their associates, successors or assigns, and whenever the words said town or Henderson, or said town, and any word or words, term or terms are used to designate the town of Henderson, North Carolina, it is understood to be the town of Henderson, in Vance County, and the State of North Carolina.

### Section XX

All other ordinances and parts of ordinances inconsistent with the provisions of this ordinance are hereby repealed and this ordinance shall take effect from and after its passage.

[fol. 21]

### EXHIBIT "B" TO COMPLAINT

Henderson, N. C.

Ordinance of August 22nd, 1921

The City Council of the City of Henderson, N. C. finding as facts:

1. That the public supply of water for the City of Henderson is dangerously low.
2. That owing to the low water in the reservoir of the Henderson Water Company and the muddy and foul condition at around the intake pipes at said reservoir there is a possibility of the water becoming unfit for drinking or other purposes.
3. That said public water supply has been reduced to the point of endangering property in the City of Henderson in case of fire.
4. That the Henderson Water Company has not made adequate provisions to meet the growing needs and requirements of the City of Henderson and the citizens thereof for water, or to protect the health and property of the citizens of the City of Henderson in times of dry weather, by providing as adequate supply of wholesome water.

Wherefore, the City Council of the City of Henderson doth order:

1. That the Henderson Water Company provide and supply a sufficient quantity of water for adequate fire protection of property in the City of Henderson.
2. That the Henderson Water Company furnish water of a pure and wholesome quality, suitable for human drinking purposes, in sufficient quantity to supply the public and private uses of the City and the inhabitants thereof.

[fol. 22] 3. That the condition found as set forth in the above be remedied and the requirements of the foregoing order be executed and complied with at the sole expense of the Henderson Water Com-

pany in compliance with the franchise of said Henderson Water Company, the Charter of the City of Henderson and the laws of North Carolina pertaining thereto.

4. That this order shall be fully complied with by the Henderson Water Company within sixty days from the date hereof, unless a further extension of time shall be granted by this Council.

5. That this order shall be effective from and after its adoption and a copy thereof shall be spread upon the journal of this Council and a copy served upon the Henderson Water Company by the Chief of Police of the City of Henderson and due return made thereof.

Adopted by the City Council of the City of Henderson, N. C.

This August 22, 1921.

"A true copy."

S. B. Burwell, City Clerk. (Seal.)

---

[fol. 23] Jurat showing the foregoing was duly sworn to by J. H. Bridges; omitted in printing.

---

[fol. 24] IN UNITED STATES DISTRICT COURT

EQUITY SUBPŒNA (a) AND MARSHAL'S RETURN—Filed February 27, 1924

THE UNITED STATES OF AMERICA:

To the Corporation Commission of the State of North Carolina, William T. Lee, Geo. P. Pell, and A. J. Maxwell, Commissioners; R. O. Self, Clerk; James S. Manning, Attorney General, Greeting:

We command you, and every of you, that you appear before the Judges of our District Court of the United States of America, for the Eastern District of North Carolina, at the office of the Clerk of said Court, in the City of Raleigh, in said District, on the 13th day of March 1924 next, to answer the bill of complaint of Henderson Water Company, citizen and resident of the State of North Carolina, filed in the Clerk's office of said Court, in said City of Raleigh, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of Judgment being pronounced against you by default.

To the marshal of the Eastern District of North Carolina to Execute.

Witness the Hon. William Howard Taft, Chief Justice of the Supreme Court of the United States, at Raleigh, in said District,

the 22nd day of Feb., 1924, and in the 148th year of the Independence of the United States.

Issued the 22 day of Feb., 1924.

S. A. Ashe, Clerk U. S. District Court, by C. C. Cunningham, Deputy Clerk. (Seal of U. S. District Court.)

The within-named defendants are notified that unless they enter their appearance in the Clerk's office of said District Court at Raleigh and file their answer, or other defense, on or before the 20th day after service hereof, excluding the day of service, the bill filed herein will be taken as confessed and a decree entered accordingly.

S. A. Ashe, Clerk U. S. District Court, by C. C. Cunningham, Deputy.

[fol. 25] Marshal's Return on Equity Subpœna (a)—Filed Feb. 27, 1924

Received at Raleigh, North Carolina, February 22, 1924 and executed at Raleigh, North Carolina, February 23, 1924, by personal service on R. O. Self, James S. Manning, William T. Lee, George P. Pell and A. J. Maxwell.

R. W. Ward, U. S. Marshal, by W. W. Utley, Chief Deputy.

Fees \$10.00.

[fol. 26] IN UNITED STATES DISTRICT COURT

EQUITY SUBPœNA (B) AND MARSHAL'S RETURN

THE UNITED STATES OF AMERICA:

To the City of Henderson, S. R. Chavasse, Mayor; M. N. Parrish, J. T. Elmore, Sr., W. D. Burwell, R. E. Clements, W. H. Grisson, Aldermen, Greeting:

We command you, and every of you, that you appear before the Judges of our District Court of the United States of America, for the Eastern District of North Carolina, at the office of the Clerk of said Court, in the City of Raleigh, in said District, on the 13th day of March 1924 next, to answer the bill of complaint of the Henderson Water Company, citizen and resident of the State of North Carolina, filed in the Clerk's office of said Court, in said City of Raleigh, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of Judgment being pronounced against you by default.

To the marshal of the Eastern District of North Carolina to Execute.

Witness the Hon. William Howard Taft, Chief Justice of the Supreme Court of the United States, at Raleigh, in said District,

the 22nd day of Feb., 1924, and in the 148th year of the Independence of the United States.

Issued the 22 day of Feb., 1924.

S. A. Ashe, Clerk U. S. District Court, by C. C. Cunningham, Deputy Clerk. (Seal of U. S. District Court.)

The within-named defendants are notified that unless they enter their appearance in the Clerk's office of said District Court at Raleigh and file their answer, or other defense, on or before the 20th day after service hereof, excluding the day of service, the bill filed herein will be taken as confessed and a decree entered accordingly.

S. A. Ashe, Clerk U. S. District Court, by C. C. Cunningham, Deputy.

[fol. 27] Marshal's Return on Equity Subpoena (b)

Received at Raleigh, North Carolina, Feb. 22, 1924, Executed at Henderson, N. C., Feb. 23, 1924, by delivering and leaving copy of the within Equity Subpoena with the within named S. R. Chavasse, Mayor; M. N. Parrish, J. T. Elmore, Sr., W. D. Burwell, R. E. Clements, and W. H. Grisson, Aldermen.

R. W. Ward, U. S. Marshal, by C. H. Hunnicutt, Deputy U. S. M.

Fees \$12.00.

[fol. 28] IN UNITED STATES DISTRICT COURT

EQUITY SUBPOENA (c) AND MARSHAL'S RETURN

THE UNITED STATES OF AMERICA:

To the City of Henderson, James W. Jenkins, W. A. Hunt, S. G. Walters, Aldermen; S. B. Burwell, City Clerk; B. H. Perry, City Attorney, Greeting:

We command you, and every of you, that you appear before the Judges of our District Court of the United States of America, for the Eastern District of North Carolina, at the office of the Clerk of said Court, in the City of Raleigh, in said District, on the 13th day of March, 1924 next, to answer the bill of complaint of the Henderson Water Company, citizen and resident of the State of North Carolina, filed in the Clerk's office of said Court, in said City of Raleigh, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshall of the Eastern District of North Carolina to execute.

Witness the Hon. William Howard Taft, Chief Justice of the Supreme Court of the United States, at Raleigh, in said District,



the 22 day of Feb., 1924, and in the 148th year of the Independence of the United States.

Issued the 22 day of Feb., 1924.

S. A. Ashe, Clerk U. S. District Court, by C. C. Cunningham,  
Deputy. (Seal of U. S. District Court.)

The within-named defendants are notified that unless they enter their appearance in the Clerk's office of said District Court at Raleigh and file their answer, or other defense, on or before the 20th day after service hereof, excluding the day of service, the bill filed herein will be taken as confessed and a decree entered accordingly.

S. A. Ashe, Clerk U. S. District Court, by C. C. Cunningham,  
Deputy.

[fol. 29] Marshal's Return on Equity Subpœna (c)

Received at Raleigh, N. C., Feb. 22, 1924. Executed at Henderson, N. C., Feb. 23, 1924, by delivering copy of the within Equity Subpœna *and* to the following: James W. Jenkins, W. A. Hunt, S. G. Walters, S. B. Burwell and B. H. Perry.

R. W. Ward, U. S. Marshal, by C. H. Hunnicutt, Deputy  
U. S. Marshal.

Fees .....	\$10.00
Cost .....	5.26
Total .....	<u>\$15.26</u>

[fol. 30] IN UNITED STATES DISTRICT COURT

ANSWER OF THE CORPORATION COMMISSION OF NORTH CAROLINA—  
Filed March 8, 1924

[Title omitted]

Now come the defendants, the Corporation Commission of North Carolina, Wm. T. Lee, George P. Pell, A. J. Maxwell and R. O. Self, who, answering the bill of complaint of the complainant, say:

1. They admit allegation one, except that part which states that R. O. Self and James S. Manning are members of the Corporation Commission, and that part they deny.

## II

Allegation two is admitted.

## III

Allegation number three is admitted.

## IV

Allegation number four is admitted.

## V

Allegation five so far as it alleges that this suit is of a civil nature is admitted, but so far as it alleges that it arises under the constitution and laws of the United States it is denied.

## VI

The defendants have no knowledge or information as to the truth of allegation number six and therefore deny the same.

## VII

Allegation seven is admitted.

## VIII

Defendants have no information as to the facts stated in allegation eight and therefore deny the same.

[fol. 31]

## IX

Defendants deny allegation nine.

## X

Defendants have no information as to the facts stated in allegation ten and therefore deny the same.

## XI

Defendants have no information as to the facts stated in allegation eleven and therefore deny the same.

## XII

Defendants have no information as to the facts stated in allegation twelve and therefore deny the same.

## XIII

Defendants have no information as to the facts stated in allegation thirteen and therefore deny the same.

## XIV

Allegation fourteen is admitted.

## XV

Allegation fifteen is admitted.

## XVI

Defendants have no information as to the facts stated in allegation sixteen and therefore deny the same.

## XVII

Defendants have no information as to the facts stated in allegation seventeen and therefore deny the same.

## XVIII

Allegation eighteen is admitted.

## XIX

Allegation nineteen is admitted.

## XX

Allegation twenty is denied.

## XXI

Allegation twenty-one is admitted.

## XXII

Defendants have no information as to the facts stated in allegation twenty-two and therefore deny the same.

[fol. 32]

## XXIII

Defendants have no information as to the facts stated in allegation twenty-three and therefore deny the same.

## XXIV

Defendants have no information as to the facts stated in allegation twenty-four and therefore deny the same.

## XXV

Defendants have no information as to the facts stated in allegation twenty-five, and therefore deny the same.

## XXVI

Defendants have no information as to the facts stated in allegation twenty-six, and therefore deny the same.

## XXVII

Defendants have no information as to the facts stated in allegation twenty-seven and therefore deny the same.

## XXVIII

Defendants have no information as to the facts stated in allegation twenty-eight and therefore deny the same.

## XXIX

Defendants have no information as to the facts stated in allegation twenty-nine and therefore deny the same.

## XXX

Defendants deny the first paragraph of allegation thirty. As to the second paragraph it admits that complainant is entitled to a fair return upon the value of its property, but deny that it has the right to the independent judgment of this court in a procedure of this nature since the laws of the State of North Carolina provide for it an adequate remedy, to-wit: the right to file another petition before the Corporation Commission of North Carolina averring that the rates provided by its order have been tested out and found inadequate to provide a fair return on the value of its property. Defendants aver that an adequate remedy being provided by law, complainant has no right to ask the intervention of a court of equity.

[fol. 33]

## XXXI

Defendants have no information as to the facts stated in allegation thirty-one and therefore deny the same.

## XXXII

Defendants have no information as to the facts stated in allegation thirty-two and therefore deny the same.

## XXXIII

Defendants have no information as to the facts stated in allegation thirty-three and therefore deny the same.

## XXXIV

Allegation thirty-four is denied.

## XXXV

Allegation thirty-five is denied as therein stated.

## XXXVI

Defendants have no knowledge as to the facts stated in allegation thirty-six.

## XXXVII

Allegation thirty-seven is denied as therein stated.

## XXXVIII

Allegation thirty-eight is denied.

Wherefore defendants, having fully answered, pray the court that the suit be dismissed and they go without day.

James S. Manning, Attorney General; Frank Nash, Asst. Atty General.

[fol. 34] Jurat showing the foregoing was duly sworn to by George P. Pell; omitted in printing.

---

[fol. 35] IN UNITED STATES DISTRICT COURT

ANSWER OF THE CITY OF HENDERSON AND OTHERS—Filed July 30, 1924

[Title omitted]

The defendant the City of Henderson and the individual defendants composing the government of said city answer the complaint as follows:

(1) These defendants in answer to section one of the complaint admit that plaintiff was a corporation for 30 years, ending June 30, 1924, and that it has by certificate filed attempted to extend its existence fifty years more; but defendants allege on information and belief that the original corporation possessed an exclusive franchise to furnish water to the defendant City and its inhabitants which ought not and could not be obtained at the time of said extension, and that said franchise could not and does not belong to the present plaintiff and cannot be claimed by it. These defendants submit to this Honorable Court whether said charter has been legally extended or whether the corporation has expired by legal limitation.

These defendants insisting the plaintiff has no legal capacity to sue upon said contract and franchise, admit that the City of Henderson is a municipal corporation with the powers conferred on it by law and that the individual defendants were at the beginning of the action its government officers.

(3) Section three of the complaint is not denied.

(4) Section four — the complaint is true.

(5) Section five of the complaint is not true and is denied. If the plaintiff's cause of action set forth in the complaint arises upon or under the constitution and laws of the United States, defendants submit that every action that can be begun to recover the value of services rendered or commodities sold arises under the constitution and laws of the United States.

[fol. 36] (6) It is true that the amount the plaintiff seeks to recover through a series of months of years to come will aggregate more than \$3,000.00, but no single sum or item it seeks to recover amounted or amounts to \$3,000. For this reason as well as because all the parties are citizens of North Carolina, and because the subject of the action did not arise under the Constitution and laws of the United States in a jurisdictional sense, defendants submit that the action could not and cannot be maintained.

(7) Defendants submit that the plaintiff has now no legal entity and cannot maintain this action upon the franchise obtained. They admit that the plaintiff was chartered for 30 years from July 1, 1894, which was the longest time for which it could obtain a charter or a legal existence and right to do business in North Carolina.

(8) Defendants admit that the water works referred to by the plaintiff were begun under a franchise granted by defendants then a town to one J. L. Ludlow on March 26, 1890. He failed to avail himself of said franchise and it was declared forfeited on March 16, 1892 and a like franchise was acquired by others who failed to complete and operate the works. The Superior Court of Vance County, N. C., completed and operated them until sold by said court in May, 1894 and bought by J. Whit Wood as trustee for himself and others for \$32,010.00. They then and promptly thereafter acquired the charter herein above mentioned; and by means of large mortgages placed upon the plant for as much, if not more than its value, managed to hold and operate same till the present time.

These defendants allege that the defendant City had the right under the law to enter into the contract or franchise referred to and to contract and agree with plaintiff, and agree upon the price at which water should be furnished; and they submit that neither plaintiff nor the Corporation Commission, nor the Courts of North Carolina, nor this Honorable Court had or has any right or authority against the consent of the defendant, the City of Henderson to change or alter the rates or prices at which water should be sold during the life of the contract or franchise. Such consent the defendants have and do expressly refuse to give and for this reason defendants submit this action cannot be maintained.

(9) Section 9 of the complaint is not true and is denied. If it were true the allegation furnishes no ground for an action for the reason stated in section 8 of this answer, and plaintiff has not now, if any, an exclusive franchise with defendant. In this connection defendants allege that plaintiff claimed to have furnished water for five years at less than the contract rates. Defendants allege that the income of the property at the contract rates for water properly collected and administered is more than a fair and proper return and income from the investment.

The Plaintiff has lost sight of the fact that more than three fourths of the period of usefulness of its property as fixed by law has expired. The suggestion or idea that the value of this old outfit had trebled because of the inflation cause- by the world war and that the value

of the services of its employees have greatly increased and that its outfit was worth as much as it would cost to build a new one in 1922, defendants submit are not justified by the facts.

(10) Section 10 of the complaint is not true. The franchise required the Water Co., to furnish abundance of pure and wholesome water. This the State considered later that the company could not do and was not doing, and if it made the requirements complained of such were in reasonable contemplation of the parties if not within the terms and meaning of the contract and furnished no cause of complaint or action. If the requisitions were onerous they furnish no cause or part of a cause of action against defendants.

(11) In answer to section eleven defendants say that the amount of water supplied by plaintiff and the income therefrom is many times larger now, than when plaintiff commenced operating.

A large part of the expense complained of in section 11 resulted from the negligence of plaintiff in allowing the water to leak out of its reservoir and be wasted, which resulted in such a shortage of water, that plaintiff was unable to fulfill its contract. In the fall of 1921 in order to prevent a water famine, the defendants were compelled to apply to the court, which took possession of the plant and operated it obtaining water from additional sources. This cost a large part of the \$60,000 expense complained of. This expense was the direct result of negligence on part of plaintiff in failing to provide and conserve a sufficient amount of water and defendants should never be required to pay any part of this expense or any income on this outlay.

All orders or ordinances requiring plaintiff to extend its water mains were made under the contract of plaintiff with defendant and in compliance therewith and plaintiff is entitled to no further compensation therefore than the hydrant rental as fixed by said contract.

Defendants again allege that the income of the business, properly collected and applied, was and is more than a fair compensation for the service, including the outlay and present value of the plant.

(12) The matters alleged in Section 12 being as appear therein the result of the negligence of plaintiff in failing to conserve the water, stop the leaks, supply other water, furnish no cause of action against defendants or for increasing the rate income of the company. The alleged recent abundance of water is more than the franchise required to be furnished and is surplusage in the complaint.

(13) Defendants admit that plaintiff asked them to unite with it in asking the Corporation Commission to increase the rates and that it declined to do so. Defendants allege that said company did not conceive this idea or at any rate express it until after its failure to provide water made the action of the City above recited necessary; and they allege that all this effort to get more pay resulted from plaintiff's pique because of having to pay on the order of the Court the sum it did for additional water supply. Defendants insisted then and ever and now that the contract prices stipulated



prevail during the life of the contract, and cannot be changed without the consent of defendants.

(14) Defendants admit the application to the Corporation Commission and its strenuous opposition to the same and to the order made, and its appeal therefrom as provided by law, and that the [fol. 39] appeal was pending in the Superior Court of Vance County where it has been delayed by the dilatory pleas of plaintiff till the present time. Defendants insist that no court had or has the right to change the rates for water prescribed by the franchise, and that the persistent and hitherto successful efforts of the water company to change them were and constituted such a breach of the contract by plaintiff on the one part as to release defendant city and its inhabitants from said contract. Defendants pray this court if plaintiff shall be held to have any status in court, that its action may have that effect, and that defendant may be decreed to be released from said franchise and may be held to be privileged to obtain its water supply elsewhere.

(15) The allegations of section 15 are admitted except the allegation that the July order reduced the compensation allowed to be charged by the orders of earlier date. That allegation on information and belief defendants deny.

(16) Defendants were and are of opinion that the failure of plaintiff to appeal was because of the additional compensation it considered that the order gave it, and that an appeal by it would in the meantime prevent the collection of the increased rates. The allegations that the rate contracted for in advance and the rate allowed by the commission to be charged were not fair compensation for the water are denied. And defendants allege that the valuation attempted to be placed on plaintiff's property by plaintiff was and is a great deal more than the property is worth. The period of usefulness of the property is fixed by law at 40 years. Thirty four years of its life have already passed.

(17) In so far as defendants are required to answer the allegations set out in Sec. 17, they deny the same. They allege that the charges for water were and are ample to cover cost of operation the plant and a fair return upon the investment.

(18) Section 18 of the complaint is admitted to be true.

(19) Section 19 of the complaint is admitted to be true.

(20) Section 20 of the complaint is not true and the same is [fol. 40] denied, and defendants submit that they are irrelevant and should be stricken from the complaint.

(21) Defendants deny that the allegations in Sec. 21 are true. They allege that the plaintiff for more than 30 years kept its contract without complaint, charging, as it alleged, for five years less than the contract allowed, and that it is *ex post facto* suggestions of what it ought to have made and saved should not be considered.

(22) On information and belief the allegations in Sec. 22 of the complaint are not true and are denied, and the same are irrelevant and should be stricken out.

(23) The first part of section 23 of the complaint is not true and is denied. Defendants allege on information and belief that practically all expenditures by the company since its organization were from borrowings and earnings.

(24) Sec. 24 of the complaint is untrue and is denied. Thirty four fortieths of the period of usefulness and of the value of its property have expired.

(25) Section 25 is not true and the same is denied.

(26) All that the appeal of the defendants from the order of the Corporation Commission has cost plaintiff was the dilatory appeals for continuances of the case in the Superior Court of Vance County. These it made successfully. The thought and allegation of confiscation came to plaintiff late in its life after more than 30 years of prosperity in the profits of a contract of its own seeking.

(27) The water without cost the plaintiff furnished many years, as per contract, and then tried to evade doing so. The Court held, 151 N. C. p. 171, it was bound by the contract to furnish the water free. No plea of confiscation was there made.

(28) Defendant agrees that plaintiff had no remedy but to comply with its contract. It should have no other remedy.

(29) Defendant denies that plaintiff ought to have been allowed to collect more than the contract provided.

(30) Section 30 (the first part) of the complaint is not true and [fol. 41] is denied. Defendant says the contract compensation was ample to plaintiff and the extra allowance was and is excessive.

(31) On information and belief the allegations of section 31 are not true and are denied.

(32) Defendants allege that section 32 of the complaint is an attempted superfluous argument in favor of the plea for leave to break the contract. Any inferences of fact therein the defendants on information and belief deny.

(33) Defendants on information and belief deny that the allegations of fact contained in Sec. 33 are true.

(34) Sec. 34 defendants submit contains arguments and opinions and are not facts. Any allegations of fact therein attempting to charge defendants beyond the contract price are denied.

(35) Plaintiff commenced the proceeding complained of. It cited the parties other than the City and caused them to appear and to except to the charges it sought to impose.

(36) Section 36 has no place in the complaint. Defendants move that it be stricken out. Nevertheless defendants allege that the offers of the plaintiff were demands for higher rates and threats of suit if they were not allowed and to make the defendant pay \$8,000.00 in costs if the demand of the company were not conceded.

(37) Section 37 has heretofore been passed on by the court, and the injunctive relief refused, and yet defendants have to date been unable to bring the case to trial.

(38) Section 38 is untrue and is denied.

Defendants pray the judgment of this Honorable Court—

1st. That this court has no jurisdiction to hear and determine the claim made because there is no diversity of citizenship and because the claim does not arise under the Constitution and laws of the United States, and this Court has no jurisdiction thereof.

2nd. That the action has abated by the expiration of the charter of the late plaintiff by limitation, and that it has no exclusive contract or franchise to furnish water to defendant City.

[fol. 42] 3rd. That the contract and franchise with plaintiff expired June 30, 1924.

4th. That until that time the rates prescribed by the franchise were binding and could not be altered.

5th. For costs.

6th. And for such other and further relief as the court may deem proper.

Perry & Kittrell, Hicks & Son, Attorneys for Defendant.

Jurat showing the foregoing was duly sworn to by S. R. Chavasse; omitted in printing.

---

[fol. 43] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR INTERLOCUTORY RESTRAINING ORDER—  
Filed Feb. 22, 1924

[Title omitted]

To the defendants above named:

Take notice that the Complainant above named will move before the Honorable H. G. Connor United States Judge at his Chambers in the United States Court House in Raleigh on the 29th day of February, 1924 at 12 o'clock Noon for an interlocutory order restraining the Defendants above named from the further prosecution of an action in the Superior Court of Vance County entitled the

State of North Carolina on relation of the North Carolina Corporation Commission against the City of Henderson, Carolina Bagging Company, Henderson Cotton Mills and James H. Brodie on the grounds as set forth in the Bill of Complaint attached to this notice and more particularly on the ground set forth in Paragraph 37 of said Complaint.

This the 22 day of February, 1924.

J. P. Zollicoffer, Solicitor for the Complainant.

[fol. 44] Marshal's Return on Notice to Defendants—Filed Feb. 27, 1924

Received at Raleigh, North Carolina, February 22, 1924. Executed at Raleigh, North Carolina, February 23, 1924, by delivering copy of the within Notice to the within named William T. Lee, Geo. P. Pell, A. J. Maxwell, R. O. Self and James S. Manning.

R. W. Ward, U. S. Marshal, by W. W. Utley, Chief Deputy.

Received at Raleigh, February 22, 1924. Executed at Henderson, N. C., February 23, 1924, by delivering copy of Notice to the following: S. R. Chavasse, M. N. Parrish, J. T. Elmore, W. D. Burwell, R. E. Clements, W. H. Grissom, James W. Jenkins, W. A. Hunt, S. G. Walters, S. B. Burrell, B. H. Perry.

R. W. Ward, U. S. Marshal, by C. H. Hunnicutt, Deputy Marshal.

---

**MOTION OF COMPLAINANT FOR AN INJUNCTION RESTRAINING DEFENDANT CITY OF HENDERSON FROM PROSECUTING AN ACTION IN THE SUPERIOR COURT OF VANCE COUNTY**

(This motion is found in full as Complainant's prayer No. 2, page 19 of this Transcript.)

---

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

**ANSWER OF THE CITY OF HENDERSON TO MOTION**—Filed Feb. 29, 1924

Now comes the City of Henderson by Counsel on Feb. 29th, before expiration of the time to answer and moves the Hon. H. G. Connor, Judge to dismiss the above entitled action for want of jurisdiction in this Court to entertain the same on the following grounds:

(1) The allegations in the Complaint do not show that the action involves a construction of the constitution or laws or treaties of the United States, the question being solely what is the compensation to which plaintiff is entitled for the service rendered defendant.

(2) Plaintiff began a proceeding in the courts of North Carolina to determine that question, which proceeding as appears by the bill is still pending in the Superior Court of Vance County, North Carolina.

(3) Plaintiff being Plaintiff in said proceeding and not a defendant, all parties being residents of North Carolina, and said action having been determined in the court of original jurisdiction and now pending on appeal in the Superior Court, from whose determination an appeal lies to the Supreme Court of the State and thence to the Supreme Court of the United States, it is not allowable for plaintiff to abandon said original action, or as petitioner therein after the same has been litigated about one and a half years to abandon said proceeding and seek relief in this new action.

(4) It appears in and by the Complaint and exhibits herein that plaintiff made or his assigners did the contract sued on in Feb., 1890, [fol. 46] to run forty years, that the judgment in the proceeding now pending in the State Courts allowed a considerable increase in plaintiff's compensation under the contract, which judgment by the terms of the Statute of the State will remain in force and operative until reversed on appeal; the hearing of which has now been delayed 5 months by plaintiff. It would be inequitable to allow Plaintiff to abandon said action leaving the Judgment therein in force.

(5) This action and the one pending in the State Court are based on the idea and theory that the court can break a contract for plaintiff most solemnly entered into, and that it will do so.

Wherefore defendant prays that the action and motion for injunction be dismissed and denied.

Perry & Kittrell, T. T. Hicks & Son, Attorneys for City of Henderson.

[fol. 47]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING APPLICATION FOR INJUNCTION—Filed March 1, 1924

The above entitled cause coming on to be heard, February 29, 1924, before Honorable H. G. Connor, Judge of said Court, upon a motion by the complainant for an order restraining the defendant The City of Henderson, from further prosecuting the appeal now pending in the Superior Court of Vance County, from the orders of The Corporation Commission of The State of North Carolina, which orders as it appears increased the water rates to be charged by the complainant. The Court upon consideration of said motion and after argument of counsel doth adjudge that the said motion be denied. It appearing from the complaint that the proceeding was instituted before The Corporation Commission upon a statute of the

State of North Carolina and that the relief sought by the petitioner was in part granted and that the complainant did not appeal from said order. It is further ordered that the motion of the defendants The City of Henderson and its officers to dismiss the suit be reserved for further consideration by the Court. The parties being allowed to file briefs upon the same.

H. G. Connor, Judge.

To this order the plaintiff duly excepted. Exception allowed Feb. 29th, 1924.

H. G. Connor, Judge.

[fol. 48]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR AN INTERLOCUTORY INJUNCTION—Filed September 13, 1924

Now comes Complainant and filed this its motion for the issuance of an interlocutory injunction for the reasons, and on the grounds set forth in its Bill of Complaint, to prevent irreparable damage to the Complainant. Complainant further makes this its application to this court for a hearing on this cause; for an interlocutory injunction in accordance with Section 266 of the Judicial Code of the United States as amended by the Act of Congress approved March 14th, 1913.

And Complainant further gives notice that on the hearing of said motion it will ask the court to substitute in place of the schedule of rates established by the Corporation Commission of North Carolina by its order of July 27th, 1923, and for the authority of said court to charge and collect in the place of said rates, under such conditions as to the court may seem just; the following schedule of rates:

For Water Service

Monthly Rates in Cents per 100 Cubic Feet

For first 2,000 Cu. Ft. per month.....	.40
For next 2,000 Cu. Ft. " " .....	.35
For next 4,000 Cu. Ft. " " .....	.30
For next 4,000 Cu. Ft. " " .....	.25
After 12,000 Cu. Ft. Consumption per month.....	.20

Hydrant Rental

For each double nozzle Fire Hydrant for public or private use to be used in case of fire only, \$5.00 per month, payable monthly.  
This June 24th, 1924.

J. P. Zollicoffer, J. H. Bridgers, of Counsel for Complainant.

[fol. 49]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

## ORDER SETTING HEARING FOR MOTION FOR INTERLOCUTORY INJUNCTION—Filed Sept. 13, 1924

The Complainant in the above cause having filed its motion before the undersigned United States Judge of the Circuit Court for the Eastern District of North Carolina for a hearing in this cause for an interlocutory injunction in accordance with Section 266 of the Judicial Code of the United States as amended by the Act of Congress approved March 14th, 1913:

Now on motion of said Complainant it is ordered that the defendants appear before a United States Judge and a Judge of the Circuit Court of the United States and another District Judge of the United States, sitting to hear this matter on the 22nd day of September 1924 at 11 o'clock A. M. at the court room of the United States District Court in the City of Raleigh, N. C., and then and there show cause if any they have why the interlocutory injunction asked for should not issue.

It is further ordered that a copy of this order certified under the hand and seal of this court be served on each of the defendants and that copies of this order duly certified under the hand of the Clerk be served especially on the Hon. James S. Manning, Attorney General, and the Hon. Cameron Morrison, Governor, respectively of the States of North Carolina, and that the hearing of this cause in an application for an interlocutory injunction be had and proceeded with in accordance with Section 266 of the Judicial Code of the United States as amended by the Act of Congress approved March 14th, 1913. That a copy of Complainant's motion be attached.

Dated at Marion, S. C., this the 12 day of Sept., 1924.

C. A. Woods, Circuit Judge United States.

[fol. 50] Marshal's Return on Order of Circuit Judge—Filed Sept. 15, 1924

Received at Raleigh, North Carolina, September 13, 1924. Executed at Raleigh, North Carolina, September 13, 1924, by delivering copy to Judge J. S. Manning, Attorney General, Judge Geo. P. Pell, Corporation Commissioner for the Corporation Commission, and W. H. Richardson, Private Secretary to the Governor.

R. W. Ward, United States Marshal, by W. W. Utley, Deputy U. S. Marshal.

Fees \$6.00.

Received at Raleigh, North Carolina, September 13, 1924, and Executed at Henderson, North Carolina, September 13, 1924, by

delivering copy to S. R. Chavass, Mayor, and B. H. Perry, City Attorney.

R. W. Ward, United States Marshal.

Fees.....	\$4.00
Exps.....	9.02
	<hr/>
	\$13.02

[fol. 51]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF COMPLAINANT FOR RESTRAINING ORDER—Filed Sept. 15,  
1924

To Messrs. Perry & Kittrell, Hicks & Son, Attorneys for the City of  
Henderson:

Please take notice that the above Complainant, Henderson Water Company will renew its motion for an injunction to restrain the City of Henderson from further prosecution of its appeal from the orders of the Corporation Commission made on March 29th, 1923 and July 27th, 1923 on the ground that such restraining order is necessary to preserve the jurisdiction of the United States Court and in order to protect the decree of the United States Court; before a Special Court of three Judges, one of which is a Circuit Judge at the United States District Court Room in Raleigh, N. C., on September 22nd, 1924 at 11 o'clock A. M. or as soon thereafter as counsel may be heard.

This September 15th, 1924.

J. H. Bridgers, of Counsel for Complainant.

Service accepted without prejudice. All rights reserved. September 15, 1924.

B. H. Perry, of Counsel for Defendant.

[fol. 52]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Answer of the City of Henderson to the Motion for an Injunction—  
Filed Sept. 22, 1924

The defendant the City of Henderson, in opposition to the motion of the Henderson Water Company for an Interlocutory Injunction against this defendant, and for an order substituting other and higher rates than those now received by plaintiff for water, respectfully sheweth:



1st. This defendant was given authority by the legislature of North Carolina, see its Act of March 11th, 1889, "To provide water and lights for said town (now city) and to contract for same, to provide for the cleansing and repairing of the streets, regulate the market, take all proper means to prevent and extinguish fires" etc., see Section 24 of said act, and pursuant to said authority said town on February 3rd, 1890 contracted with one J. L. Ludlow to furnish water to the said town and its inhabitants for forty years, at certain specified rates. He assigned this franchise to Woltman, Keith & Company, who forfeited the same. On March 16th, 1892 the same franchise or contract was granted to J. Whitwood and others, who likewise failed, and the water system was completed by a Receiver appointed by the Court, and was sold by the court, and bought by the present company in May 1894 for \$32,010.00. It at once issued stock to the amount of \$65,000.00 and executed a mortgage on the plant for \$97,500.00. It claims under said franchise the right to extend the life of the contract for another forty years.

2nd. Since this litigation begun plaintiff has rendered a statement showing that in the year 1895 it supplied 107 water taps and had an income of \$1,806.42. In the year 1900 it had 165 taps and [fol. 53] an income of \$3,495.15; in the year 1910 it had 374 taps and an income of \$9,813.90 and in 1920 it had 867 taps and an income of \$27,385.94. Its source of supply has all the time been abundant and is within about one mile of the corporate limits. It furnished water at the prices provided in the contract and without complaining for 28 years, until the spring of the year 1922. Indeed plaintiff alleges that for six years prior to July 1917 it furnished water at rates lower than those authorized by the contract.

3rd. In the year 1909 plaintiff brought suit to nullify the provisions of the contract requiring it to furnish water free to public schools, but the Supreme Court of the state held, 151 N. C. 179, that the contract was valid and binding, and that it contemplated changes and increases of burdens and extensions to the service and it refused to release the plaintiff. Defendant respectfully refers this court to said opinion on page 179.

4th. Plaintiff did not take proper care of its water supply but allowed its dam to leak and in a dry spell in the summer and fall of the year 1921 the water ran out and the supply of water failed, so that the court on application of the city, took charge of the property, and through its receivers, at an expense of about \$17,000.00, which plaintiff was required to pay, supplied the deficiency. Thereupon plaintiff became piqued, and in the Spring of 1922, while the plant was yet in the custody of the court, applied to the Corporation Commission of the state, upon what plaintiff claims was the ample authority contained in Chapter 21 of the Consolidated Statutes of the state, which authority this defendant denied, to allow it to increase the rates for water. The application could not be considered by the commission because of the existence of the receivership, and was dismissed. Then plaintiff after several months of effort and paying the money incurred

by the receivership, and partly stopping the leaks in the dam, obtained an order discharging the receivership, and promptly thereafter renewed to the Corporation Commission its application for an increase in Water Rates.

5th. This defendant insisted before the Commission, and at every subsequent stage of the litigation, and still does, that the contract as to the rates to be charged was binding upon the plaintiff and could [fol. 54] not be altered by plaintiff or the Corporation Commission or the courts; but the Commission in March 1922, without making an appraisal of the value of the property of the plaintiff, or passing upon the question of its authority, ordered the rates to be increased, as plaintiff contends, about 16 $\frac{3}{4}$ %. In July 1923 it made another ruling further increasing the rates as defendant contends, but very slightly reducing them below the March increase, as plaintiff contends. Said rates were put into effect and collected by the plaintiff for the month of March 1923 and ever since though it now undertakes to deny the authority of the Commission to make them.

6th. Defendant appealed, as by the terms of the statute it might, from the July 1923 order of the Corporation Commission to the Superior Court of Vance County, where the matter might have been heard and determined at the September Term 1923 of said court, but plaintiff, so delighted was it on account of the receipt of the increase in rate, influenced the Corporation Commission to refuse to send the appeal to the Superior Court of Vance County, as by law it was bound to do, and made necessary the issuance by the Judge of the said court of the writ of Certiorari to said Corporation Commission, which was strenuously opposed by the plaintiff.

7th. Just before the next or March Term of the Superior Court of Vance County plaintiff filed a motion in said court to remove said cause to the Eastern District of North Carolina of the U. S. Court at Raleigh; and it also begun this action in said U. S. District Court, and moved before Hon. H. G. Connor, Judge of said Court, on notice to defendant on February 27th, 1924 for an order restraining the further prosecution of the first action it had brought in the Superior Court of Vance County, and for an order to remove the case in Vance Superior Court to the District Court of the United States. Both said motions were by the Judge, after full hearings, on the same day, refused. And the Judge of the Superior Court of Vance County also refused to grant the motion for an order of removal to the U. S. Court.

8th. The case stood for trial at the May Term 1924 of Vance [Fol. 55] Superior Court, but plaintiff, without notice to defendant, renewed its application to the Hon. H. G. Connor, Judge, at New Bern, N. C. for an order to have said cause docketed in the U. S. Court at Raleigh, and plaintiff actually obtained from said Judge on May 6th, 1924 an order to that effect, which it presented to the Judge of the Superior Court of Vance County just as said cause was to be called for trial. But the said Judge Connor granted a motion shortly thereafter for an order to remand the said case to the Superior Court of Vance County and the same was done and said action now

awaits trial in said court and has precedence at a term beginning the 29th of September 1924. This defendant moved that the bill of plaintiff filed in the U. S. District Court be dismissed. This motion was on June 13th, 1924 denied by the Judge and defendant was allowed until August 1st, to answer the bill, which it did. But the Judge declared he would not hear the case until after the determination of the case in Vance County Superior Court, since he desired said decision for his information and assistance in determining the case.

9th. This defendant shows to the court that there is no allegation in Plaintiff's original petition to the Corporation Commission that the statute under which said Commission was created and is acting, was or is unconstitutional. On the contrary plaintiff invoked and alleged its plenary authority to grant the relief plaintiff sought: and plaintiff has since March 1923 gladly accepted the increase in rates it ordered and has done everything in its power to this day to prevent a review by the state courts of the order of said Commission.

10th. That plaintiff is not entitled to an injunction as prayed: For the plaintiff has a full and adequate remedy at law. The rate now complained of was fixed by the Corporation Commission upon petition of plaintiff and over the objection of the defendant. The plaintiff had a right to have said rate reviewed by the Superior Court of Vance County on appeal, or after trying out the rate to again petition the Corporation Commission for relief. Neither of which the plaintiff has done and now seeks to prevent the defendant from doing.

11th. This cause was removed from the State to the Federal Court, and Judge Connor finding that it was improperly removed, remanded [fol. 56] it to the State Court. Under Judicial Code Chapter 3 Sec. 28, This action was not appealable, though the plaintiff now seeks to have this court review and reverse the action of Judge Connor indirectly by granting the injunction prayed for.

12th. The State Courts in passing upon defendant's appeal from the Corporation Commission act in a legislative capacity with full power to fix such rates as they may deem just. See Corporation Commission vs. R. R. 151 N. C. 447. The Plaintiff has not exhausted its administrative remedy in the State Courts and is not entitled to relief by the Federal Courts as in the case of Pacific T. & T. Company vs. Kuykendall U. S. Adv. Sheets of June 16, 1924, page 622.

13th. Plaintiff's plant cost plaintiff \$32,010.00 in 1894. It had been in the process of completion and in use about 4 years. It has since been in use for thirty years. Its period of usefulness, as defined by Section 2942 (3) of Consolidated Statutes of the State, was and is forty years.

An unprecedented effort was made by the state in the year 1920 to get all of the property in the state on the tax books at its true value in money; "to make the tax books speak the truth." Yet plaintiff's property that year was valued at only \$34,390.00 and that

state Corporation Commission, with its corrective power over the same increased the valuation \$15,610, making it \$50,000.00. Plaintiff not satisfied with its own valuation and that of the state, sent for Milwaukee to an appraiser, who by valuing at \$112.00 four chairs that cost \$40.00 nearly thirty years ago, some partitions to divide an office into two rooms at \$1,400.00, though they cost \$375.00 and a small wooden cottage on the bank of the pond that probably cost \$700.00 many years ago, at \$4,945.30, and other things in like proportion, including large estimates of the cost of original engineering, present cost of reproduction and etc., estimated the value of the plant at \$162,000.00. The expense of operation of the plant is as defendant contends likewise padded so as to enable plaintiff to strain itself into claiming and contending that it had not been getting a fair [fol. 57] return on the supposed alleged great value of the property all these thirty years and that its property is being confiscated.

Wherefore the defendant most respectfully submits to your Honors:

1. That the District Court of the United States has no jurisdiction of this action, because all the parties are citizens of North Carolina, and because the action does not arise under the Constitution or laws of the U. S.

2. That plaintiff has no right to maintain this action because the contract is binding and inviolable during its life.

3. If the contract can be changed against defendant's consent the effect of such change is to release the defendant and allow it to provide itself with water elsewhere and defendant asks the court to so declare.

4. That the proceeding before the Corporation Commission, now pending by appeal in the State court was invoked and instituted by the plaintiff who has taken and is taking large benefit under it. It gives plaintiff far more than did the contract under which the plaintiff operated for thirty years, and the Corporation Commission and the act creating it are constitutional and legal and from its rulings appeals lie to the Superior and Supreme Courts of the State and through them to the Supreme Court of the United States; and no injunction ought to suspend or restrain the operation or enforcement of the order appealed from until its validity is finally determined on appeal.

5. But if this Honorable Court shall deem it to be its duty to issue its decree suspending further proceedings in the action in the State Court, this defendant submits that it will also restrain the collection of the increased rates given to the plaintiff by said order.

6. And as to the notice of an application of plaintiff to this Court to increase its charges for water at this time, defendant submits that this hearing is and can be under section 266 of the Judicial Code, for no other purpose than to determine the validity of the act under

which the Corporation Commission proceeded at plaintiff's instance, [fol. 58] and the validity of the order it made at plaintiff's instance.

S. R. Chavasse being first duly sworn, says that he is Mayor of the City of Henderson, N. C., and has authority as such to verify this pleading; that the same is true of his own knowledge, except as to matters stated on information and belief. And as to those he believes it to be true.

S. R. Chavasse. Perry & Kittrell, Hicks & Son, Attys. for City of Henderson.

Sworn to and subscribed before me this 19 September 1924.  
A. H. Cheek, Notary Public. My commission expires  
June 30, 1925. (Notarial Seal.)

---

[Fol. 59] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MRS. EFFIE K. MILNE—Filed Sept. 27, 1924

Mrs. Effie K. Milne being duly sworn deposes and says: That since 1920 she has kept the Purchasing Journal of the Henderson Water Company in which there is recorded all disbursements of the Company, and there has been charged to the fixed capital of the Company for Plant Additions for four years and eight months ending August 31st, 1924, \$81,889.95, by years and amounts as follows:

Distribution	1920	1921	1922	1923	8 mos., 1924
Distribution System.....	1,938.04	5,488.53	5,824.98	19,453.73	7,640.96
Buildings & Real Estate.....	2,210.90	1,050.76	2,335.64	93.92	2,021.15
Furniture & Fixtures.....	185.16	40.00	1,614.03	1,517.13	48.75
Machinery, pumps, etc.....	1,114.21	3,087.55	585.73	508.49	.....
Boilers & Engines.....	35.00	.....	61.10	15.90	.....
Filters & Wells.....	8.75	3,391.31	2,557.02	523.87	7,397.82
Transportation Equip.....	257.08	2.67	.....	200.00	.....
Hydrants & Valves.....	13.39	82.10	535.54	2,073.71	917.42
Meters .....	967.29	1,090.85	864.87	1,858.09	2,002.48
Tools .....	14.50	.....	210.25	49.28	.....
	<u>6,744.32</u>	<u>14,233.77</u>	<u>14,589.16</u>	<u>26,294.12</u>	<u>20,028.48</u>

Making the total fixed capital by years as follows:

For year 1920.....	6,744.32
For year 1921.....	14,233.77
For year 1922.....	14,589.16
For year 1923.....	26,294.12
For 8 Mos. 1924.....	20,028.58
	<hr/>
	81,889.95

[Fol. 60] That of the amount charged under the head of Furniture & Fixtures in the year 1922 \$1,614.03 was court cost, receivers, Attorneys' and witnesses' fees, and in the year 1923, \$1,199.00 was court cost, attorneys' and witnesses' fees.

These amounts were added in the column of Furniture & Fixtures for the lack of space in the ruled columns, but are specifically itemized in the record of disbursements in the Purchasing Journal.

Mrs. Effie K. Milne.

Sworn to and subscribed before me this the 20th day of September, 1924. F. B. Hight, Notary Public. My commission expires September 19, 1926. (Notarial Seal.)

[Fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MRS. MARY B. MATTHEWS—Filed Sept. 27, 1924

Mrs. Mary B. Matthews being duly sworn deposes and says that she has been in charge of the Consumers Ledger of the Henderson Water Company since August, 1920, and has compared the income of the Company received from April 1st, 1923 to August 31st, 1923, with that received from April 1st, 1924 to August 31st, 1924, a period of five months.

That there has been a decline in the income of the Company for the same five months of 1924 of \$59.28 for the same period of 1923.

The books of the Company show that from January 1st, 1923 to August 31st, 1924 the Company made plant additions of \$46,332.00.

The rates authorized by the Corporation Commission went into effect April 1st, 1923.

Mrs. Mary B. Matthews.

Sworn to and subscribed before me this the 20 day of September 1924. F. B. Hight, Notary Public. My Commission expires September 19, 1926. (Notarial Seal.)

[Fol. 62]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. P. RENN—Filed Sept. 27, 1924

J. P. Renn being duly sworn says that he has been in the employ of the Henderson Water Company more than twenty years, that *that* pumps of the Company are now operated by purchased electric current, the company also maintains its steam plant in good operating condition, with steam on its boilers at all times, the fire banked, and that three hundred tons of coal per annum are required for such service. The Company owns and keeps in first class operating condition two complete steam plants, one complete electric plant, each of the normal capacity required, and has on hand the material for erecting two additional complete filter plants each of which, in addition to the present filter plant, are more than sufficient for the needs of the City and that one unit of the new filter plants, to-wit: the clear water storage basin has been installed during the last ninety days.

That no deterioration or depreciation has been permitted to occur in the mechanical equipment of the company, and that all parts which have suffered deterioration and depreciation have been renewed from time to time, including the boiler plant.

That the company owns two sources of supply for water, and during long dry periods in 1923 and 1924 were ample to maintain the main reservoir within from three to five inches of the normal by pumping from the second source of supply from time to time.

J. P. Renn.

Sworn to and subscribed before me this the 20 day of September 1924. F. B. Hight, Notary Public. My commission expires September 19, 1926. (Notarial Seal.)

[fol. 63]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF R. W. ROBERTSON—September 27, 1924

R. W. Robertson being duly sworn says that he has been employed by the Henderson Water Company for more than twenty years and during that time has frequently cut the mains to make connections, that in so doing he finds that said mains show no deterioration whatever, that they are free from tubercles on the inside; and that the asphalt coating on the inside and outside is in nearly every case as bright as new pipe.

That during the fall of 1922 and the year 1923 he laid several thousand feet of new 6" main and that as result of laying the same the Company has received less than 25 customers the same having been supplied by service heretofore.

R. W. Robertson.



Sworn to and subscribed before me this the 20 day of Sept. 1924. F. B. Hight, Notary Public. My commission expires Sept. 19, 1926. (Notarial Seal.)

[fol. 64]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. L. LUDLOW—Filed Sept. 27, 1924

NORTH CAROLINA,  
Forsyth County:

J. L. Ludlow being duly sworn deposes and says: That he has been regularly and continuously engaged in the practice of engineering in North Carolina and other Southern States since the year 1888.

In November, 1922, I made an estimate of the original cost of the Henderson water works in accordance with the quantities and sizes of material set forth in the franchise, and I estimated that the same would have cost in 1892 the sum of \$76,998.25. This estimate includes \$5,775.00 for purchase of the source of water supply, but does not include the usual allowance for rights-of-way, organization, and legal expenses, or interest during construction.

In November 1922 I was shown what purported to be an inventory made by the American Appraisal Company of the property as it existed and in operation October 1st, 1920. I made an estimate of the reproduction cost of a water works, such as exists in the Henderson Water Works of the material specified in the inventory.

My estimate of the cost of such a water works plant located in the City of Henderson in November 1922 was \$255,960.14. This does not include any additions or extensions made to the plant since October 1920.

At the time of my visit to Henderson for making inspection of the water works plant in November 1922 I was shown and carefully examined a section of water main which had just been removed from the ground. This was a piece of pipe taken from the distribution system. It was very clean and uninjured by age. For all practical purposes it was just as good as brand new pipe. It showed no depreciation due to destruction of coating, and the formation of tubercles on the inner surface of the pipe which frequently occurs. The degree to which cast iron pipe depreciates by tuberculation depends principally upon the character of the coating applied and the [fol. 65] nature of the water which is carried by the pipe line. The character of the water of the Henderson water supply appears, from the piece of pipe inspected, to have very little effect in causing tuberculation and consequent depreciation of the value of the pipe. In this case the injury to the pipe was so slight as to be negligible.

I also visited the pumping station and the filter plant of the Henderson Water Works and saw the plant in operation. The upkeep and general operating conditions of the plant was very good. I saw one of the steam pumps started up and it worked successfully and just like an emergency pump should.

I visited the auxiliary supply of the Henderson Water Works about a thousand feet below the dam of the principal reservoir. The construction and equipment there was rather crude and rough, yet it provided all that was necessary for an emergency supply. I do not think a more permanent type of construction would have been justified for the needs.

J. L. Ludlow.

I, W. A. Wilkinson, do hereby certify that J. L. Ludlow personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and official seal this the third day of July, 1924.

W. A. Wilkinson, N. P. My commission expires Feb. 21, 1925. (Notarial Seal.)

[fol. 66]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF E. B. HEIMBACH—Sept. 27, 1924

STATE OF WISCONSIN,  
Milwaukee County, ss:

E. B. Heimbach being duly sworn on Oath deposes and says that he is a representative of The American Appraisal Company, a corporation organized and existing under the laws of the State of Wisconsin, and that he makes this affidavit as such representative of said corporation and is duly authorized to do so;

That said Company was organized in 1898, and has been continuously engaged in making inspections and valuation reports on various kinds of properties;

That as such representative of said The American Appraisal Company the said E. B. Heimbach personally inspected and appraised the property of the Henderson Water Company, Henderson, North Carolina as of the date October 1, 1920;

That the cost of reproduction of the property appraised as of October 1, 1920, in accordance with market prices prevailing as of that date, as shown in the appraisal invoice submitted under date of December 28, 1920, was three hundred eighty thousand five hundred seventy-eight dollars and eleven cents (\$380,578.11).

E. B. Heimbach, Representative of the American Appraisal Company.

Subscribed and sworn to before me this 5th day of October, 1923, M. L. Lutzenberger, Notary Public, Milwaukee County, Wis. My commission expires April 11, 1926. (Notarial Seal.)

[fol. 67] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF A. F. BAILEY—Filed Sept. 27, 1924

STATE OF WISCONSIN,  
Milwaukee County, ss:

A. F. Bailey being duly sworn on oath deposes and says that he is Vice President of The American Appraisal Company, a Corporation organized and existing under the laws of the State of Wisconsin, and that he makes this affidavit as officer of said corporation, and is duly authorized to do so;

That said Company was organized in 1898, and has been continuously engaged in making inspections and valuation reports on various kinds of properties;

That said Company made an appraisal of the Henderson Water Company, Henderson, North Carolina, as of the date of October 1, 1920;

That the appraisal of said property was made as are all other appraisals of said Appraisal Company, through the co-operative work of its organization, in accordance with its standard practice, methods and in conformity with its statistical and analytical cost data and records;

That the field portion of said appraisal was based upon a personal inspection of the property which was supplemented by the co-operative work of the office staff in establishing the cost of reproduction and sound value as of the date of the appraisal, October 1, 1920;

That the appraisal made as of October 1, 1920, was revised as of Nov. 1, 1922 through an office repricing without a field reinspection;

That the cost of reproduction of the property appraised as of October 1, 1920, revised in accordance with market prices prevailing November 1, 1922, without allowance for accrued depreciation, was found to be three hundred three thousand one hundred ninety six dollars and four cents (\$303,196.04).

A. F. Bailey, Vice President.

Subscribed and sworn to before me this 28th day of June, 1924. M. L. Lutzenberger, Notary Public, Milwaukee County, Wis. My commission expires April 11, 1926.  
(Notarial Seal.)

[fol. 68] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. H. BRIDGERS—Filed Sept. 27, 1924

J. H. Bridgers being duly sworn deposes and says:

That he has been connected with the Henderson Water Company and its predecessors since 1891.

That said Company was organized under Chapter 165 of the Private Laws of the State of North Carolina for the year 1887, and that said charter was amended by the Act of Assembly in the year 1891, that all the property of said Company was sold by public auction under decree of the Superior Court of Vance County in May 1894 and purchased by J. Whit Wood, Trustee, for himself and other creditors.

The said J. Whit Wood organized the Henderson Water Company under section 697 of the code of North Carolina under the name of the Henderson Water Company, and the same was duly incorporated in the office of the Clerk on July 9th 1894, said certificate of incorporation was duly amended on the 20th day of July 1894, and again in the year 1923.

The construction of the Henderson Water Works had been begun by the firm of Woltmann Keith & Co., under a franchise granted to J. L. Ludlow on the 17th day of April 1890 and assigned by J. L. Ludlow to Woltmann Keith & Co., on the 8th day of May 1890. Said Water Works were begun and the source of supply acquired, pump house and stand pipe constructed, and 10" and 12" mains laid down Andrews Avenue and Garnett Street to Burwell Avenue in the fall of 1890.

The 6" pipe for the distribution system for the Town of Henderson was stopped in transit by the McNeal Pipe & Foundry Company and unloaded and held under attachment proceedings against the same until early in the year 1892 when the franchise held by Woltmann Keith & Co. was declared forfeited and on March 16th 1892 [fol. 69] reenacted, and granted by the Town of Henderson to J. Whit Wood, A. H. McNeal and W. L. Granger. Messrs. Wood & McNeal were creditors of the contractor and material men of the Water Company, amounting to two-thirds of the cost of the works and W. L. Granger was an Attorney representing the other one-third of the cost of the works.

In order to complete the works under direction of the Court, on account of conflicting interest, the property was placed in the hands of Henry Perry, Esq. as Receiver, and the parties above named supplied him with necessary funds to complete the works which was done and the same accepted by the City of Henderson in May 1892.

The property of the Henderson Water Works was sold under a judgment of the Superior Court of Vance County in May 1894, and purchased by J. Whit Wood as Trustee for himself and other creditors for the amount of the prior claims of \$32,000; said creditors holding unsecured claims against the property amounting to \$45,000. Said creditors, with their Attorneys had devoted a large amount of time to the completion of the Water Works.

The same had been operated for two years under the Receivership and when the creditors organized the Company in July 1894 they found that the actual cost of the property had been in excess of \$85,000, and that the expense to them had been nearly \$10,000 more.

That since August 1st, 1894, the property has been under the management of this affiant, who received as compensation of his

services the sum of \$500.00 per annum for many years. No other officer has ever received any salary.

The incorporators for their expenditure of nearly \$100,000 received from the corporation \$65,000 of bonds bearing interest at 4%.

It was due to this low rate of interest and economical management that the Company was able to operate up to 1905. From the time of its organization to the present time the Company has added to its fixed capital \$144,318.05 and that no charge for construction has been made for any part of the time of J. P. Renn who has constructed [fol. 70] the additions to the pumping and filter plant, from plans and specifications of consulting engineers, or of R. W. Robertson who has laid all the distribution system for the past twenty years; or of J. H. Bridgers who has furnished all the executive and legal service to the Company, except where litigation was involved. A fair charge for these services would have added at least \$15,000 to the cost of the property, and would have increased the earnings of the Company by the same amount.

Up to the year 1912 the expense of the Company was largely shared by the Electric Power Company and the Henderson Water Company was relieved of at least \$1,000 in clerical and incidental expenses by that arrangement.

The Company had failed to earn under the most economical management 6% on its actual cost since its organization, by more than \$100,000, without any reserve for renewals, or inadequacies.

The employees of the Company are paid slightly less than other persons in the community occupying places of the same responsibility and requiring training and skill to perform, and are paid less than they should be paid in order for them to make any saving, or for the Company to set aside any fund for accident or disability.

Affiant is informed and believes that a fund set aside for accident, disability, old age for faithful employees in public service, is an allowable expense charge, and that the Complainant should be allowed to make the same.

The Defendant, the City of Henderson has complained of the amount of clerical service employed by the Company and of the salaries paid its Engineer, Superintendent of Distribution and President. All of the time of two clerks is required for more than twenty days of each month in order to give the public satisfactory service. The Company tried the experiment of one clerk, by using its meter reader to assist. Its losses in collections and stopped meters exceeded the cost of additional clerical service.

The duties of the President have included executive direction of the Company, purchases, contracts, all forms of Tax Reports, verification of its accounting, consultation with Engineers, Insurance, in- [fol. 71] terests, and the State Board of Health.

Affiant is informed and believes that a duplication of his service and experience could not be secured by the Company for less than \$3,600 per annum.

Affiant has used every possible effort in increasing the income of

the Company and decreasing expenses at all times and particularly during the past three years.

The property of the Company has not been allowed to depreciate in any respect and it is at this time better equipped and more efficiently operated than any time in its history.

For the eight months ending August 31st, 1924, the Company has earned on its actual cash cost 6.13% per annum without any allowance for inadequacy, or any of the hazards of operation.

The Company has earned for the eight months ending August 31st, 1924, on \$380,000, the present reproduction cost of the property 3.90% per annum without any allowance for inadequacy or the hazards of the business.

The affiant has calculated the increase in income which would accrue to the company if the rates named in the motion for interlocutory injunction were permitted to be established.

The Company would receive the following sums:

From 950 Domestic Consumers, \$3.00 per annum.....	\$2,850.00
From 68 Public Fire Hydrants, \$16.00 per annum.....	1,088.00
From 49 Public Fire Hydrants, \$21.50 per annum.....	1,053.50
From 41 Private Hydrants, \$16.00 per annum.....	656.00
From Commercial Consumers, per annum.....	553.00
Total.....	6,200.50

This additional income would just be sufficient for the Company to set aside the necessary fund to cover the future inadequacy of its mains during the next twenty years, so that it would be in position to promptly lay larger mains in the streets, probably in advance of their needs, whenever the City renews its pavement.

The City now being completely paved, the cost of renewing mains will be largely increased estimated at at least 50% more.

J. H. Bridgers.

Sworn to and subscribed before me this 20 day of September 1924. F. B. Hight, Notary Public. My commission expires September 19, 1926. (Notarial Seal.)

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING APPLICATION FOR INJUNCTION—Filed Sept. 27, 1924

This cause comes on to be heard at Raleigh, in the Eastern District of North Carolina, on the 22nd day of September, 1924 before the undersigned, a court convened by virtue of the Act of Congress approved March 3, 1911, as amended by Act of Congress approved

March 4, 1913, relating to the hearing, trial, and determination of questions involving the validity of state legislation alleged to be in violation of the Constitution of the United States, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state; and plaintiff in said cause having therein prayed for a preliminary injunction to temporarily restrain the defendants therein named from [fol. 73] the further prosecution of certain appeals now pending in the Superior Court of Vance County, North Carolina, from the orders of defendant corporation commission and also to restrain the said corporation commission of the State of North Carolina, and the City of Henderson, North Carolina, as well as the individual members of said commission and the officials of said City of Henderson from enforcing the orders of said commission relating to the rates to be charged by the plaintiff for water supplied by it under its franchise from said city; and the application having been duly assigned for hearing and the solicitors for the parties having been duly heard, and the court having taken time for advisement and being of opinion that the complainant has not sufficiently exhausted its remedies before the defendant, The Corporation Commission of the State of North Carolina.

It is now, after consideration, ordered, adjudged and decreed that the application for preliminary injunction be and the same is hereby denied.

Ordered further that said cause proceed as usual in equity.

C. A. Woods, Circuit Judge. H. H. Watkins, D. Lawrence Groner, District Judges.

---

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 1, 1925

Now comes the Complainant in the above entitled cause and files the following assignment of errors upon which it will rely upon the prosecution of its appeal in the above entitled cause from the decree made by this Honorable Court on the 27th day of September 1924 composed of Hon. Chas. A. Woods, U. S. Circuit Judge, Hon. H. H. Watkins, and D. Lawrence Groner, District Judges sitting as a Special Court in the Eastern District of North Carolina and says that the said United States District Court erred as follows:

I

In denying the injunction prayed for by the Complainant restraining the City of Henderson from the further prosecution of a cause pending in the Superior Court of Vance County entitled the State of North Carolina in the relation of the North Carolina Corporation Commission against the City of Henderson.



## II

In denying the interlocutory injunction; and in denying the Complainant the authority to substitute in the place of the schedule of rates heretofore established by the Corporation Commission of the State of North Carolina; the schedule named and set forth in the Complainant's motion for interlocutory injunction.

## III

In not granting the relief as prayed for in the bill; and more particularly in not granting the interlocutory injunction as authorized under Section 266 of the Judicial Code.

Wherefore Complainant prays that the said decree be reversed and that the said District Court for the Eastern District of North Carolina be ordered to enter decree granting the motions made by the Complainant in said cause.

This December 19th, 1924.

James H. Bridgers, Solicitor for the Complainant.

[fol. 76]

IN UNITED DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Jan. 3, 1925

Hon. Samuel A. Ashe, clerk United States District Court, Raleigh, N. C.

SIR: You are hereby requested to certify to the Supreme Court of the United States as the record of the case on appeal in this action the following:

Bill of Complaint with Ordinance and Exhibit "B."

Subpœna.

Answer of Defendant North Carolina Corporation Commission, et al.

Answer of Defendant City of Henderson, et al.

Motion of Complainant for an Injunction Restraining Defendant City of Henderson from prosecuting an action in the Superior Court of Vance County.

Answer of the City of Henderson to the Motion.

Decree of March 1st, 1924 denying same.

Motion of Complainant for an Interlocutory Injunction before Three Judges.

Order of Circuit Judge for hearing same.

Motion of Complainant dated Sept. 15th, 1924 for Restraining Order to preserve the jurisdiction of the United States Court.



Answer of the City of Henderson to said motions.

The Affidavits of Effie K. Milne, Mary B. Matthews, J. P. Renn, R. W. Robertson, J. L. Ludlow, E. B. Heimbach, A. F. Bailey, J. H. Bridgers, in support of the motions of Complainant.

Decree of Sept. 27th, 1924.

Petition for appeal.

Assignment of errors.

Order allowing appeal.

Citation of appeal.

Bond.

Precept to the Clerk of the United States District Court.

This December 31st, 1924.

J. H. Bridgers, Solicitor for Complainant.

Service accepted Jan. 1, 1925. B. H. Perry, of Counsel for City of Henderson.

Service accepted Jan. 2, 1925. James S. Manning, Attorney General and Counsel for North Carolina Corporation Commission.

[fol. 77] Memorandum of Original Papers Certified Separately

Petition for Appeal filed January 1, 1925.

Appeal allowed Dec. 22, 1924.

Appeal bond dated the 22 day of December, 1924, penalty, \$500.00; Obligors: Henderson Water Company and Fidelity & Deposit Company of Maryland: Conditioned for costs.

Citation dated December 22, 1924; service accepted by Perry & Kittrell and T. T. Hicks of Counsel for the City of Henderson and by James S. Manning, Attorney General for the State of North Carolina, December 19, 1924.

---

[fol. 78] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO TRANSMIT RECORD

And thereupon it is ordered by the Court here that a transcript of the record and proceedings in said suit be transmitted to the United States Supreme Court at Washington, D. C., and the same is transmitted accordingly.

S. A. Ashe, Clerk United States District Court.

[fol. 79]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

## CLERK'S CERTIFICATE

I, S. A. Ashe, Clerk, United States District Court for the Eastern District of North Carolina, do hereby certify that the foregoing pages present a full, true and correct copy of the proceedings had and orders entered in that certain suit in equity pending in said Court, wherein Henderson Water Company is complainant and Corporation Commission of the State of North Carolina, The City of Henderson, and others, are defendants.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said District Court at the Courthouse in Raleigh, State of North Carolina, this 15 day of January, 1925.

S. A. Ashe, Clerk United States District Court. (Seal of the United States District Court, Eastern Dist. of N. C. at Raleigh.)

Endorsed on cover: File No. 30,816. E. North Carolina D. C. U. S. Term No. 851. Henderson Water Company, appellant, vs. The Corporation Commission of the State of North Carolina, Wm. T. Lee, Geo. P. Pell, et al., etc., et al. Filed January 19th, 1925. File No. 30,816.

(5727)

U.S. SUPREME COURT  
FILED  
FEB 26 1925  
W. C. STANLEY  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
AUTUMN TERM, 1924 1925

**N 249**

HENDERSON WATER COMPANY, Appellant,

vs.

NORTH CAROLINA CORPORATION COMMISSION  
ET AL., CITY OF HENDERSON ET AL., Appellees.

MOTION IN ADVANCE FOR ARGUMENT OR WRITING TO THE  
SUGGEST DOCKET

DAVID W. HARRIS

JAMES C. HARRIS

Attorneys for Appellant

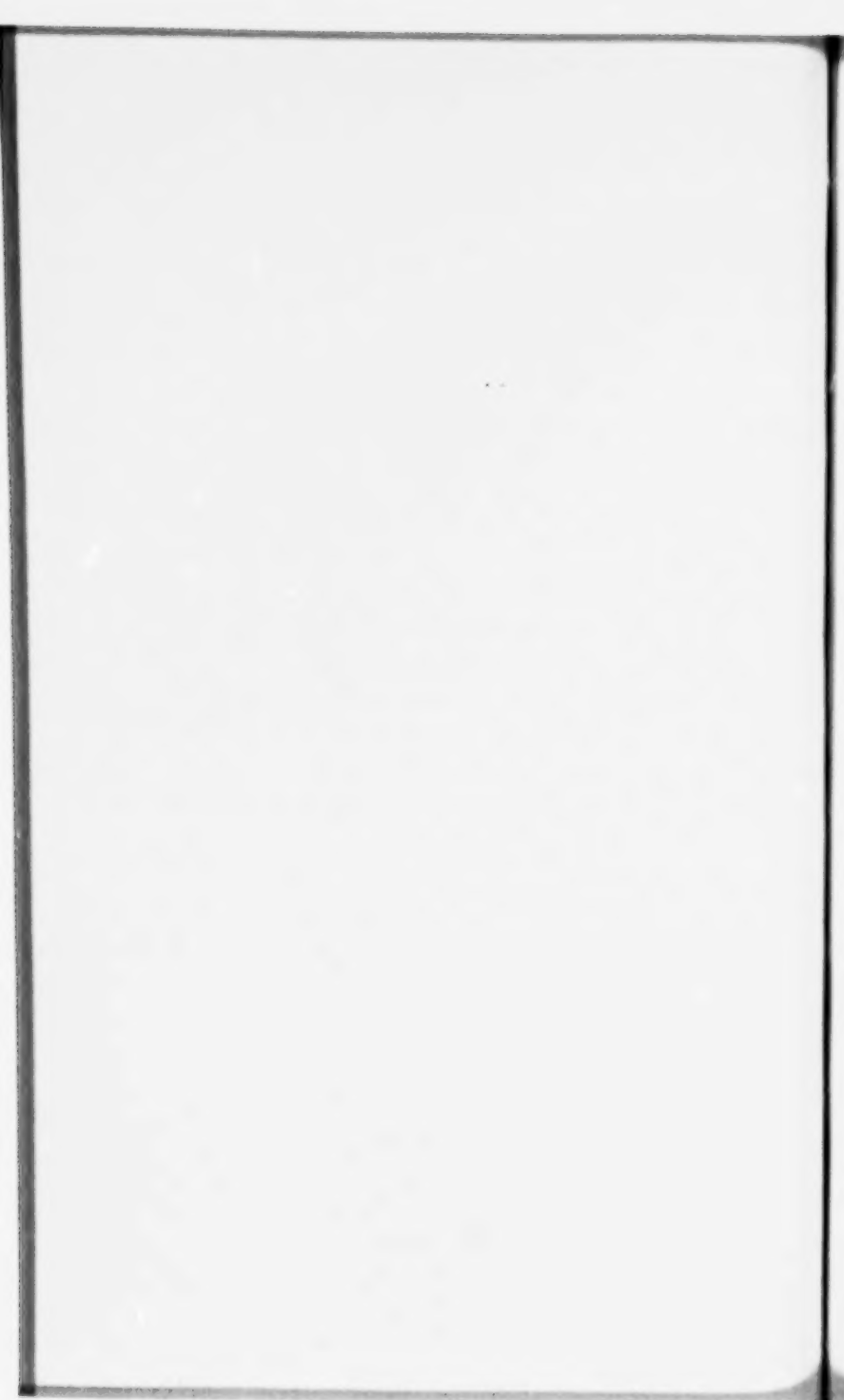


## TOPICAL INDEX.

	Page
Notice of motion.....	1
Motion .....	3
Main grounds of this motion.....	4
Brief in support of the motion.....	5

## AUTHORITIES CITED.

Oklahoma Natural Gas Co. vs. Russell, 261 U. S., 290.....	5
Prendergast vs. Tele. & Tele. Co., 262 U. S., 43.....	5
North Carolina Consolidated Statute, Section 1098.....	6
North Carolina Consolidated Statute, Section 1101.....	6
Pacific Tele. & Tele. Co. vs. Kuykendall, 265 U. S., 196.....	6
Bacon vs. Rutland Railroad, 232 U. S., 134.....	6
In re Utilities Co., 179 N. C., 151.....	7
Corporation Commission vs. Mfg. Co., 185 N. C., 17.....	7
Railroad Commission vs. Eastern Texas Railroad, 264 U. S., 79.	7
Davis, Director-General, vs. Wechsler, 263 U. S., 22.....	7



IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1924.

---

**No. 851.**

---

HENDERSON WATER COMPANY, APPELLANT,  
vs.  
NORTH CAROLINA CORPORATION COMMISSION  
ET AL., APPELLEES.

---

**NOTICE OF MOTION TO ADVANCE FOR ARGUMENT  
OR TRANSFER TO THE SUMMARY DOCKET.**

---

*To the North Carolina Corporation Commission:*

Hon. Dennis G. Brummitt, Attorney-General of the State of  
North Carolina; City of Henderson et al., and Its Counsel,  
Appellees.

The Henderson Water Company hereby gives notice that  
it will on Monday, March 9th, 1925, submit to the Supreme  
Court of the United States, at the Capitol, at Washington,

D. C., motion in the above entitled cause to advance the same for hearing, or to transfer to the Summary Docket.

A copy of said motion together with brief in support of the same being hereby delivered to you.

HENDERSON WATER COMPANY,  
By JAMES H. BRIDGERS,  
*Of Counsel.*

The foregoing notice is hereby accepted and delivery of a copy of the same together with copy of motion and brief in support of the same are hereby acknowledged.

This the 21st day of February, 1925.

DENNIS G. BRUMMITT,  
*Attorney General of the State of North Carolina.*

PERRY & KITTRELL,  
T. T. HICKS & SON,  
*Of Counsel for City of Henderson.*



IN THE  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

---

**No. 851.**

---

HENDERSON WATER COMPANY, APPELLANT,

*vs.*

NORTH CAROLINA CORPORATION COMMISSION  
ET AL., CITY OF HENDERSON ET AL., APPELLEES.

---

**MOTION TO ADVANCE FOR ARGUMENT OR TO  
TRANSFER TO SUMMARY DOCKET WITH STATE-  
MENT AND ARGUMENT OF THE COMPLAINANT,  
APPELLANT.**

---

Now comes the Complainant, Appellant, by its counsel of record herein, and moves this Honorable Court:

1. To advance this cause for argument; or,

2. In the event the Court should refuse to advance for argument, the Appellant moves that said cause be transferred to the Summary Docket of this Court, for that the points involved in the case are of such character as not to justify extended argument.

HENDERSON WATER COMPANY,  
By JAMES H. BRIDGERS,  
*Of Counsel.*

### **Main Grounds of This Motion.**

1. This was a motion for an Interlocutory Injunction in a suit in Equity pending in the District Court of the United States for the Eastern District of North Carolina, heard on the 22d day of September, 1924, under Section 266 of the Judicial Code, to restrain the North Carolina Corporation Commission and the individual members thereof and the City of Henderson and the individual members of its government from interfering with the complainant in collecting a higher schedule of water rates for services in the City of Henderson and adjacent thereto than it had been hitherto allowed to charge by the Corporation Commission of North Carolina.

2. The motion was heard by a Circuit Judge and two District Judges under the provisions of Section 266 of the Judicial Code, and denied without opinion by the Court on the ground that complainant had not sufficiently exhausted its remedies before the Corporation Commission of North Carolina.

3. That unless the case is advanced for argument or transferred to the Summary Docket the Complainant, Appellant will suffer irreparable loss and its rights under the Constitution of the United States denied.

### **BRIEF IN SUPPORT OF THE MOTION.**

This suit was instituted by complainant in the United States District Court for the Eastern District of North Carolina on the 22d day of February, 1924, alleging that on account of additional duties imposed, and the rates allowed, its property was being confiscated; praying the Court to require the Corporation Commission of North Carolina to establish a schedule of rates that would yield a fair return upon the property of the complainant;

Complainant not being able to obtain a hearing upon the merits of its cause on account of the congested condition of the courts in the Eastern District of North Carolina, made an application under Section 266 of the Judicial Code and the same was heard on the 22d day of September, 1924.

If the complainant can make out its case it is suffering daily from confiscation under the rates to which it is now limited.

#### **Authorities in Support of the Motion.**

The complainant was clearly entitled to the Interlocutory Injunction under the authority of the Oklahoma Natural Gas Co. *vs.* Russell et al., 261 U. S., 290.

A confiscatory order can be enjoined pending appeal to State Supreme Court.

Gas Co. *vs.* Russell, *supra*.

A temporary injunction will be upheld on appeal when the balance of injury as between the parties favors its issue.

Prendergast *vs.* Telephone Co., 262 U. S., 43.

The North Carolina Commission is vested with the final legislative authority of the State in the rate-making process.

Under Sections 1098 and 1101 North Carolina Consolidated Statutes, courts are without power to grant supersedeas and rates remain in effect until changed by the Corporation Commission.

N. C. Con. Stat., Sec. 1101.

"Rates fixed by the commission, when approved or confirmed by the judgment of the Superior Court, shall be and remain the established rates, and shall be so observed and regarded by an appealing corporation until the same shall be changed, revised or modified by the final judgment of the Supreme Court, if there shall be an appeal thereto, and until changed by the Corporation Commission."

Complainant was entitled to the Interlocutory Injunction sought under the authority of

Pacific Telephone & Telegraph Co. *vs.* Kuykendall,  
265 U. S., 196.

An action may be brought in Federal Court to enjoin enforcement of rates based on the valuation of public utility, by Department of Public Works; proceedings in State courts for review of valuation not constituting a bar to proceedings in Federal Court.

Pacific Tel. & Tel. Co. *vs.* Kuykendall, *Supra.*

Complainant is entitled to resort to this court for relief.

Bacon *vs.* Rutland Railroad, 232 U. S., 134.

The highest court in North Carolina has held that all legislative and municipal grants in the nature of a contract are subject to regulation by the State, and that the same are

granted and accepted subject to the reserved power of the State,

*In re Utilities Co.*, 179 N. C., 151.

Corporation Commission *vs.* Mfg. Co., 185 N. C., 17.

This court is asked to direct the District Court to issue the order upon such terms as to it the occasion requires.

The appellant is entitled to an order restraining the City of Henderson from prosecuting an action to lower the rates established by the Corporation Commission.

“Where it becomes necessary to consider whether a State is depriving, or attempting to deprive, a litigant of property without due process of the law in violation of the 14th Amendment and the question turns on the existence and terms of an asserted contract, this court determines for itself whether there is a contract and what are its terms.”

Railroad Commission *vs.* Eastern Texas Railroad Co., 264 U. S., 79.

If the Constitution and Laws of the United States are to be enforced, this court cannot accept as final, the decision of the State tribunal as to what are the facts alleged to give the right or to bar the assertion of it even upon local grounds.

Davis, Director General *vs.* Wechsler, 263 U. S., 22.

The action in the State court must be enjoined to protect the decree of this court.

Respectfully submitted,

JAMES H. BRIDGERS,

*Attorney for Appellant.*

HENDERSON, N. C.,

February 21, 1925.



FILED

OCT 21 1925

WM. R. STANSBURY

CLERK

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1925.**

---

**No. 249.**

---

**HENDERSON WATER COMPANY, APPELLANT,**

*vs.*

**THE CORPORATION COMMISSION OF THE STATE  
OF NORTH CAROLINA ET AL.**

---

**BRIEF FOR APPELLANT.**

---

**J. H. BRIDGERS,**

*Counsel for Appellant.*





# INDEX.

	Page
Statement of the case.....	1
Argument .....	2
Motion for injunction in this court.....	4
Consolidated statutes of North Carolina, Sec. 1068.....	5

## CASES CITED.

Bacon vs. The Rutland Railroad, 232 U. S., 134.....	2
Oklahoma Natural Gas Co. vs. Russell, 261 U. S., 290.....	2, 3
Prendergast vs. Telephone Co., 262 U. S., 43.....	3
Pacific Tel. & Tel. Co. vs. Kuykendall, 265 U. S., 196.....	3
Bluefield Water Works vs. Commission, 262 U. S., p. 679.....	4
Commission vs. Water Company, 190 N. C., page 70; 128 S. E., page 465.....	4

1100

1

2

3

4

5

6

7

8

9

10

IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1925.

---

**No. 249.**

---

HENDERSON WATER COMPANY

*vs.*

THE CORPORATION COMMISSION OF THE STATE  
OF NORTH CAROLINA ET AL., THE CITY OF  
HENDERSON ET AL.

---

**BRIEF OF THE HENDERSON WATER CO.**

---

**Statement of the Case.**

The Henderson Water Company filed a petition to establish a schedule of rates for it to charge for public service furnished by it under the provisions of Sec. 1035 of the Consolidated Statutes of that State as set forth in Sec. XVIII of the bill (R., 9).

The Commission granted the relief appearing in Sec. XIV of the bill (R., 7).

On July 27, 1923, the Corporation Commission of North

Carolina modified its original order and reduced the rates heretofore allowed (R., 7, 8).

After a trial of six months the complainant filed its bill in United States District Court on February 22, 1924, and prayed the Court, among other things, to fix the present value of the complainant's property used and useful by the public and to direct the Corporation Commission to establish a schedule of rates for the use of the property of the complainant that will yield a net return of 8 per cent upon the present value of its property, and for such other and further relief.

The complainant waited six months after filing of its bill for a hearing upon the merits, and failing to get the case assigned for hearing filed its motion on September 13, 1924, for an interlocutory injunction in accordance with Sec. 266 of the Judicial Code of the United States (R., 41).

The matter was heard before a Special Statutory Court of three judges on the 22d day of September, 1924, which court, on September 27, 1924, denied the motion on the ground "that the complainant had not sufficiently exhausted its remedies before the defendant, The Corporation Commission of the State of North Carolina" (R., 57, 58).

Thereupon the complainant assigned error in denying the interlocutory injunction and brings the case to this court on appeal.

### ARGUMENT.

The complainant relies for the jurisdiction of this court upon *Bacon vs. The Rutland Railroad*, 232 U. S., 134.

For an interlocutory injunction at this time it relies upon *Oklahoma Natural Gas Co. vs. Russell*, 261 U. S., 290.

A confiscatory order can be enjoined pending appeal to State Supreme Court.

Gas Co. *vs.* Russell, *supra*.

A temporary injunction will be upheld on appeal when the balance of the injury as between the parties favors its issue.

Prendergast *vs.* Telephone Co., 262 U. S., 43.

The complainant is entitled to the interlocutory injunction under the authority of Pacific Tel. & Tel. Co. *vs.* Kuykendall, 265 U. S., 196.

On the hearing before the three judges the Corporation Commission of the State of North Carolina did not file any answer to the motion. The City of Henderson filed an answer to the motion (R., 39).

This answer was a rambling alleged history of the case. The City of Henderson offered no proof whatever in support of its answer.

The complainant offered affidavit showing that the value of its property on October 1, 1920, was \$380,578.11. (See Heimbach's affidavit, R., 53.)

It offered the affidavit of J. L. Ludlow showing the value of 1920 in November, 1922, of its water-works plant to be \$255,960.00 (R., 52).

It offered the affidavit of Mrs. Effie K. Milne showing that \$81,889.00 had been added to the property since the appraisal of 1920 (R., 49-50).

It offered the affidavit of its president showing that it was earning on the reproduction cost of its property for the year 1924 at the rate of 3.90 per cent per annum without any allowance for future inadequacy or any of the hazards of operation (R., 57).

### **Motion for Injunction in this Court.**

If the appellant can sustain its contentions it has a loss of more than \$6,000 per annum since it filed its bill and invoked the protection of the Federal Constitution against the wrongful act of a State.

This court held in the case of the Bluefield Water Works *vs.* Commission, 262 U. S., p. 679, that public service corporations invoking the protection of the 14th Amendment were entitled to the independent judgment of this court of the law in the facts.

Since this suit was instituted, the suit instituted by the City of Henderson by an appeal from an order of the Corporation Commission has been heard in the Superior Court of Vance County, and on appeal in the Supreme Court of the State, wherein it was held that the franchise granted by the City of Henderson "*was a contract made in subordination of the police power of the State, which may be rightfully invoked by either party thereto, and subject to a fair exercise of such power, is equally binding and obligatory upon all the parties thereto.*"

The Supreme Court of the State, on June 24, 1925, held in said action that the City of Henderson had offered no evidence from which the jury could have found the facts under N. C. Statutes, C. S. Sec. 1068.

Commission *vs.* Water Company, 190 N. C., page 70;  
128 S. E., page 465.

**Consolidated Statutes of North Carolina.****SEC. 1068.**

*How Maximum Rates Fixed.*—In fixing any maximum rate or charge, or tariff of rates or changes for any common carrier, person or corporation subject to the provisions of this chapter, the commission shall take into consideration if proved, or may require proof of, the value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge or the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the State; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation, and all other facts that will enable them to determine what are reasonable and just rates, charges and tariffs.

The City of Henderson having elected to stand upon an asserted contract on the hearing before three judges, and having offered no proof on the merits, must now be considered as having confessed the bill *pendente lite*, and it, and for those for whom it speaks and seeks to represent as consumers, should be required to pay to the appellant the increased rates asked until such time as it is willing to submit itself to the court upon the merits of the proposition.

Under Banton, District Attorney, *vs.* Belt Line Railway

Corporation, decided in this Court May 25, 1925, 45 Sup. Ct. Rep., 534, appellant respectfully submits that it is entitled to a decision *per curiam*, with a mandate from this court, directing the District Court to issue the interlocutory injunction, as appellant made out a *prima facie* case. (See Record, pp. 49 to 57.)

Respectfully submitted,

JAMES H. BRIDGERS,  
*Of Counsel for Appellant.*

HENDERSON, N. C., October 15th, 1925.

(7996)



Office Supreme Court, U. S.  
FILED

MAR 10 1925

WM. R. L. ...

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1924. 1925**

---

**No. 249**

---

**HENDERSON WATER COMPANY, APPELLANT,**

*vs.*

**THE CORPORATION COMMISSION OF THE STATE  
OF NORTH CAROLINA, WM. T. LEE, GEO. P. PELL,  
ET AL., ETC., ET AL.**

---

**BRIEF OF APPELLEES ON MOTION TO ADVANCE  
AND PLACE ON THE SUMMARY DOCKET.**

---

**PERRY & KITTRELL,  
T. T. HICKS & SON,**  
*Counsel for Appellees.*



**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1924.**

---

**No. 851.**

---

**HENDERSON WATER COMPANY, APPELLANT,**

*vs.*

**NORTH CAROLINA CORPORATION COMMISSION ET  
AL., CITY OF HENDERSON ET AL., APPELLEES.**

---

**BRIEF OF APPELLEES ON MOTION TO ADVANCE  
AND PLACE ON THE SUMMARY DOCKET.**

---

The City of Henderson, appellee, defendant in error, does not oppose the advancement of this cause or a summary hearing and decision of the same.

It respectfully submits that the appeal is without merit, and that the judgment of the three judges should be affirmed, or that the appeal should be dismissed.

The appellee, or defendant in error, shows that the Henderson Water Company, as appears by this record, furnished water to the City of Henderson under the terms of its contract for twenty-eight years, until the spring of the year

1922, three years after the peak of high prices had been passed, and for five years of that time, by its own admission, at prices less than the contract allowed it to charge for water.

The record further shows that the plaintiff in error appealed to the Corporation Commission of North Carolina in the fall of the year 1922 to be allowed to charge higher rates than the contract provided; that it obtained an order from the Corporation Commission as prayed; that by dilatory pleas it delayed for more than a year the hearing of the appeal of the City of Henderson from the determination of the Corporation Commission; that the same was determined in the Superior Court of the State in October, 1924, and has been heard on appeal, but not determined, by the Supreme Court of North Carolina; that pending the above-mentioned appeal from the Corporation Commission to the Superior Court the present action was begun and an injunction against further proceedings in the State courts sought from the judge of the District Court and refused, and later from the three judges, under Section 266 of the Judicial Code, and was also refused.

It is thus seen that the plaintiff in error has averred the constitutionality of the North Carolina rate-making laws and has received benefits under them in the form of a higher rate since April, 1923. It is also apparent that the State law of North Carolina confers upon the judges of said State full power to grant injunctions in all proper cases. See Consolidated Statutes of North Carolina of the year 1919, Section 851. Hence there is yet no occasion to appeal to the courts of the United States, and the decision of the three judges was correct.

THE INJUNCTION SOUGHT PROPOSES TO DETERMINE THE  
CONTROVERSY IN ITS INCIPIENCY WITHOUT A HEARING.

It is apparent from the allegations in the pleadings that a substantial controversy exists between the parties as to the right of the plaintiff under the contract to increase the rates, and that the facts upon which it bases its claim to that right are strenuously controverted by the City of Henderson. It would, therefore, seem that the determination of the controversy in advance by an injunction alleging the unconstitutionality of laws or procedure the protection of which the plaintiff has sought in this very proceeding, could not be for a moment considered.

If it shall be attempted upon the present status of this record to determine the controversy, it will undoubtedly be done without the evidence upon which the City of Henderson relies to support the allegations contained in its answer.

The procedure under the State law is clearly defined in Consolidated Statutes of 1919, Sections 1097 and 1103. In the first instance the Commission fixes the rate. The appeal to the Superior Court gives a trial of the whole matter *de novo*. The Superior Court adopts the rate fixed by the Commission or fixes a new one. The Supreme Court on appeal passes upon the validity of the acts of the Commission and of the courts below it, and the Corporation Commission finally fixes the rate under direction of the court, as shown by its decision. See the sections cited above and Corporation Commission *vs.* Manufacturing Company, 185 N. C., 17 (6), and pages 22 and 23. Plaintiff in error has not appealed from any of the orders entered by the State Corporation Commission or its courts.

The case of Prentiss *vs.* The Atlantic Coast Line Railroad,

211 U. S., 231, was an attempt to leave a proceeding pending in the Corporation Commission and State courts of Virginia, and this court held that the appellants should have proceeded to the end of the case in the State courts before resorting to the U. S. courts. On page 230 it is said: "It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the State, in its final legislative action, would not respect what they think their rights to be before resorting to the courts of the U. S." And on page 232 of the Prentiss case the court said: "On the question of contract, as on that of confiscation, it is reasonable and proper that the evidence should be laid, in the first instance, before the body having the last legislative word."

The Prentiss case, page 231, shows that the North Carolina Corporation Commission act and the Virginia act were somewhat similar in their provisions relating to appeals. In the case of Pacific Telephone Company *vs.* Kuykendall, decided May 26, 1924, this court, by the Chief Justice, said: "It has done all it could to get relief and cannot get it." Clearly in this case the Henderson Water Company has not done what it could in its appeal to the State tribunals. This is just what the judges decided in this case that the appellant had not done: "That the complainant has not sufficiently exhausted its remedies before the defendant the Corporation Commission of the State of North Carolina."

THE CITY OF HENDERSON CONTENDS THAT THE WATER COMPANY IS BOUND BY THE CONTRACT AND CANNOT CHANGE THE RATES THEREIN PRESCRIBED DURING ITS LIFE.

The North Carolina Corporation Commission act was enacted in the year 1891 and has been several times since

amended. There is nothing in it giving the Corporation Commission the power to fix and establish rates to be charged by the water companies. This power was conferred by Section 1 of subchapter three of chapter 136 of the Acts of 1917, now Consolidated Statutes, Section 2783. The same act, chapter 1, Section 1, now Consolidated Statutes, Section 2778, expressly says: "Nothing in this act shall operate to repeal any local or special Act relating to cities and towns, but all such acts shall continue in full force and effect and in concurrence herewith unless hereafter repealed. \* \* \* The provisions of this act shall not affect any act heretofore done, liability incurred, or right accrued or vested." The charter of the City of Henderson relating to the power to execute this water contract is found in the Laws of North Carolina of the Session of 1889, chapter 241 of the Private Laws, Section 24, page 993 of the book, viz: "That among the powers hereby conferred upon the commissioners they may borrow money, pledge the credit of the town, and contract debts for the improvement of the town \* \* \* they shall have power to provide water and lights for said town and to contract for the same; provide for the cleansing and repairing of the streets; regulate the market; take all proper means to prevent and extinguish fires." The contract in this case expressly fixed the maximum rates to be charged for a period of 40 years from the year 1890, and provided for an extension for an additional forty years. The State was and is prohibited by Article 1, Section 10, of the U. S. Constitution from passing any law impairing the obligation of contracts.

The City of Henderson calls attention to the fact that the

appellant heretofore sought in the courts of North Carolina to avoid the obligation of this contract, and was told by the Supreme Court of the State, in the case of *Water Company vs. the Trustees*, 151 N. C., 171, page 177: "When the ordinance of the town was accepted by the plaintiff the execution of the contract was complete; by it valuable rights were granted the plaintiff and important duties imposed. An acceptance of those rights is an assumption of those duties. As it is a contract which binds the town not to interfere with those rights, so likewise it is one which binds the plaintiff to the discharge of those duties."

This court has said, in *Southern Iowa Electric Company vs. Chariton*, 255 U. S., 539: "Where, however, the public-service corporation and the governmental agencies dealing with them have power to contract as to rates and exert that power by fixing contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question whether such rates are confiscatory becomes immaterial." And in the more recent case of *St. Cloud Public Service Corporation vs. St. Cloud*, U. S. Advance Opinions, June 16, 1924, page 561, it is said: "And where a public-service corporation and the municipality have power to contract as to rates and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory becomes immaterial."

The City of Henderson contends that the contract suspends during its lifetime the governmental power of fixing and regulating rates.



The defendant in error, having in view the orderly procedure invoked by the plaintiff in the State tribunal and not yet ended, and the rule announced by this court that it will not presume that the courts of a State will disregard the Constitution of the United States, and that the appellant has, after proceeding for two years in the State courts, suddenly invoked the jurisdiction of the courts of the United States and sought an injunction from the three judges upon the allegation that the State courts and rate-fixing tribunals of the State were or would deprive appellant of its constitutional rights, has considered that its duty upon the hearing of the application for an injunction would be best discharged by maintaining as best it could that the procedure in the State court was and is constitutional and legal; and has not attempted to show upon the hearing of this motion its evidence upon the question of the correctness of the rates sought to be established. Defendant in error contends that no rates should be fixed or determined until the testimony shall be heard in support of the allegations contained in its answer, but that on this appeal the only questions that may be considered are the constitutionality of the procedure in the State court and the binding force of the contract plaintiff deliberately made and observed for so many years and now seeks to evade.

BENNETT, HESTER, PERRY,

PERRY & KITTRELL,

T. T. HICKS & SON,

*Attorneys for The City of Henderson,*

*Defendant in Error.*

HENDERSON, N. C., March 3, 1925.

FILED

NOV 6 1925

WM. R. STANSBURY  
CLERK

---

**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1925.**

---

**No. 249**

---

**HENDERSON WATER COMPANY, APPELLANT,**

**vs.**

**NORTH CAROLINA CORPORATION COMMISSION  
ET AL, CITY OF HENDERSON ET AL, APPELLEES,**

---

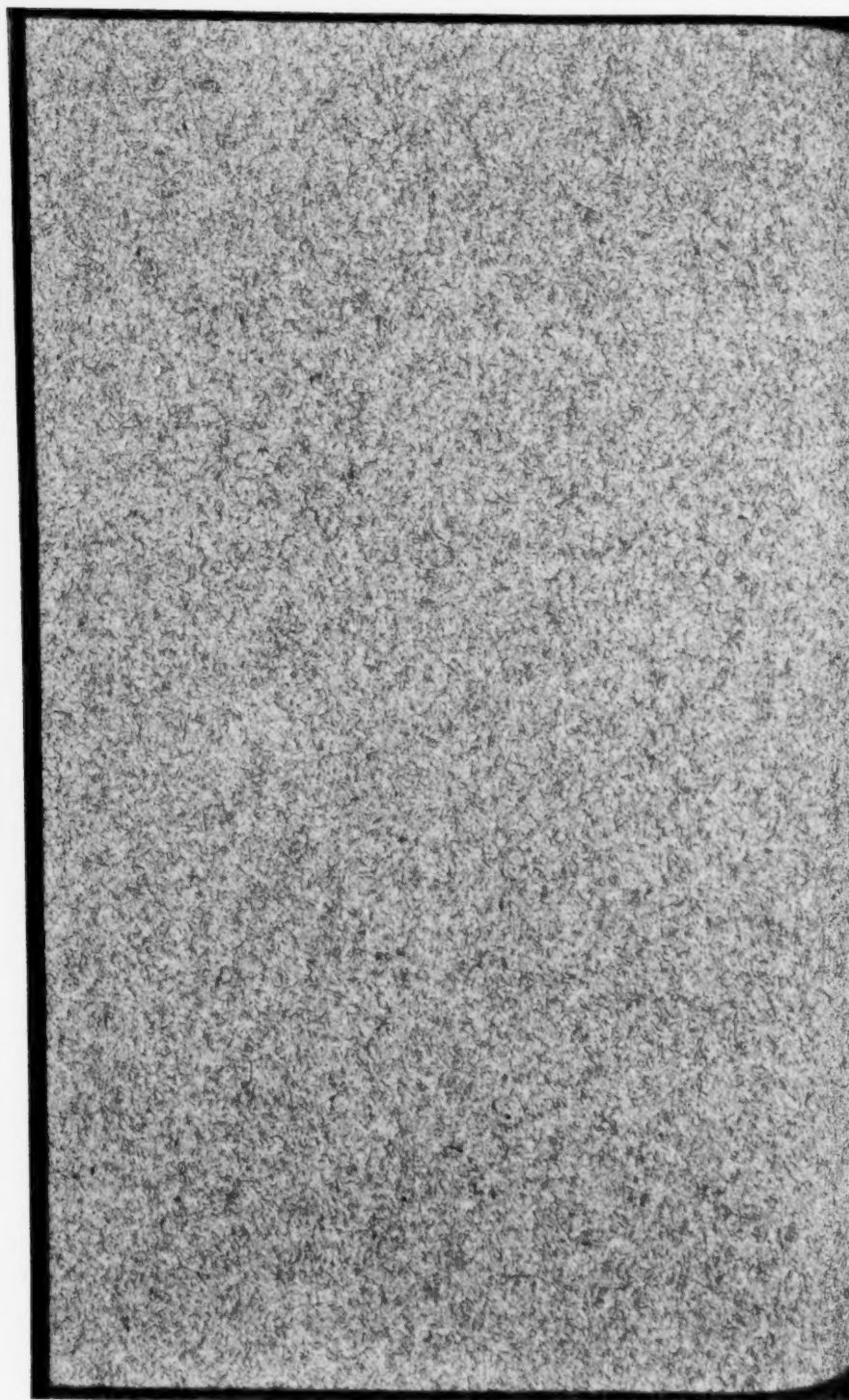
**SUPPLEMENTAL BRIEF FOR THE CITY OF  
HENDERSON, APPELLEE.**

---

**BENNETT HESTER PERRY,  
PERRY & KITTRELL,  
T. T. HICKS & SON,**

*Counsel for the City of Henderson, Appellee.*

---



## TOPICAL INDEX.

	Page
Reference to former brief.....	1
Brief statement of facts.....	1
Argument .....	3
Can relief asked be granted under Section 266 of the Judicial Code?.....	4
Are not the contract prices for water controlling?.....	6
North Carolina Supreme Court on the meaning of this con- tract .....	7

## AUTHORITIES CITED.

Banton vs. Belt Line, 268 U. S., — (May 25, 1925).....	3
Consolidated Statutes of North Carolina of 1919, Section 2942 (3) .....	2
Consolidated Statutes of North Carolina of 1919, Section 2783.	8
Consolidated Statutes of North Carolina of 1919, Section 2778.	9
Consolidated Statutes of North Carolina of 1919, Section 1066.	9
Consolidated Statutes of North Carolina of 1919, Section 1098.	9
Consolidated Statutes of North Carolina of 1919, Section 1099.	9
Consolidated Statutes of North Carolina of 1919, Section 1101.	9
Corporation Com. vs. Water Co., 190 N. C., 70.....	4, 8
Cumberland T. & T. Co. vs. La. Public Service Com., 260 U. S., 219 .....	3
Georgia R. & P. Co. vs. Decatur, 262 U. S., 432.....	7
Oklahoma Natural Gas Co. vs. Russell, 261 U. S., 293.....	3, 4
Pacific Tel. Co. vs. Kuykendall, 265 U. S., 204.....	4
Paducah vs. Paducah R. Co., 261 U. S., 267.....	7
Private Laws N. C., 1889, Chapter 241, Section 24.....	6
Southern Iowa Electric Co. vs. Chariton, 255 U. S., 539.....	7
St. Cloud Pub. Service Com. vs. St. Cloud, 265 U. S., 355.....	7
U. S. Constitution, Article 1, Section 10.....	8



**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1925.**

---

**No. 249**

---

**HENDERSON WATER COMPANY, APPELLANT,**

*vs.*

**NORTH CAROLINA CORPORATION COMMISSION  
ET AL., CITY OF HENDERSON ET AL., APPELLEES.**

---

**BRIEF FOR THE CITY OF HENDERSON, APPELLEE.**

---

**Reference to Appellee's Former Brief.**

The former brief of appellee herein, dated March 3, 1925, is perhaps erroneously labeled. Appellee did not oppose the motion to advance, but in that brief gave some reasons why the decision of the three United States judges should be affirmed if this court should decide to place the appeal on its summary docket.

**Brief Statement of Facts.**

Plaintiff has supplied the defendant water for 35 years and claims the right under its franchise to supply it 45 years more. It failed in its duty in 1921 and receivers, duly appointed, took charge of the plant and supplied water. After the discharge of the receivers, plaintiff applied to the Corporation Commission, under the authority of a State law,

for an increase of the rates fixed by the franchise and obtained it, over the objection of the defendant; but the defendant appealed to the State courts, where the water company, while receiving the advanced rates, having succeeded in delaying the hearing twelve months, began the present action in the District Court of the United States at Raleigh, alleging a very great value of its plant and an inadequate income, and prayed the United States court to stay the action of the Corporation Commission and the State court, whose jurisdiction plaintiff had invoked, and to appraise plaintiff's property at a great sum and to fix rates such as plaintiff considered adequate.

The United States District Court declined to enjoin the State court, and before the bill could be heard on its merits plaintiff applied to a Circuit Judge and two District Judges to enjoin the Corporation Commission and the State courts from further proceeding with plaintiff's suit; and plaintiff went further and offered affidavits to the three judges to show what it considered to be the value of its 34 years old plant, whose useful life is fixed by State law, Consolidated Statutes of 1919, Section 2942 (3), at 40 years, and asked the three judges to then and there fix a still higher tariff of rates to suit the plaintiff.

None of the defenses set up in the answer of the defendant and none of the evidence of the defendant were before or were considered by the three judges, who, having heard the matter and "taken time for advisement and being of opinion that complainant has not sufficiently exhausted its remedies before the defendant, the Corporation Commission of the State of North Carolina" unanimously denied the application.

Printed Record, page 58.

### ARGUMENT.

"The fact that a majority of the three judges of the District Court denied the interlocutory injunction suggests the want of merit in the application here."

Cumberland T. & T. Co. *vs.* La. Public Service Com., 260 U. S., 219.

And, on the same page:

"without abdicating our unquestioned power to grant such an application as this, and conceding that exceptional cases might arise, we are generally inclined to refer applications of this kind to the court of three judges who have heard the whole matter, have read the record and can pass on the issue without additional labor."

### The Question of Rates Should be First Tried in the District Court.

"As in our opinion the District Court had jurisdiction and a duty to try the question whether preliminary injunction should issue, and as that question has not yet been considered, the case should be remanded to that court with the directions to proceed with the trial. Generally it is not desirable that we should pass upon such matters until they have been dealt with below." Citing authorities.

Oklahoma Natural Gas Company *vs.* Russell, 261 U. S., 293.

Plaintiff submitted to the rates of which it now complains for more than thirty years, until 1922, long past the peak of war prices; for five years of that period, ending in 1917, at less than the contract rates. See answer, paragraph



9, page 34 of the printed record. Plaintiff was allowed by the Corporation Commission, in 1923, a large increase in rates, which the Superior and Supreme Courts of the State affirmed. See 190 N. C., 70; and plaintiff has had since December, 1924, an application for a still greater increase in rates pending before the Corporation Commission. This it has not seen fit to bring to a hearing. With this history in view it would seem that plaintiff should be willing to adopt the suggestions of this court quoted above and abide the orderly procedure in the District Court by first trying there the merits of its case. Plaintiff has certainly obtained relief under the State law, and it has not done all that it could to obtain more relief there, for it is still doing. To have exhausted its efforts and failed in the State tribunals was necessary before resorting to the remedy by injunction in the U. S. Court.

Oklahoma Gas Co. *vs.* Russell, 261 U. S., 293.

Pacific Tel. Co. *vs.* Kuykendall, 265 U. S., 204.

The statement of the case of *Branton vs. The Belt Line*, decided by this court May 25, 1925, 268 U. S., —; 69 L. Ed., 616, on the first page of the opinion, shows that the action had been pending nearly five years; that it had been referred to a master, who reported, and that his report was confirmed by the District Judge. The case in Supreme Court was on appeal from a final decision on the merits by a court of competent jurisdiction.

#### **Can the Relief Asked be Granted under Sec. 266 of the Judicial Code?**

The injunctive relief allowed under Section 266 must be based "upon the ground of the unconstitutionality of the

statute." The State Corporation Commission Act has long been held to be constitutional. Plaintiff does not claim that it is not constitutional. Plaintiff invokes the aid of the three judges and this court on appeal because the Commission and the State courts will not agree with the plaintiff, in advance of a trial, that plaintiff's property is worth as much as plaintiff says it is. In order, however, for plaintiff to invoke the aid of the 14th Amendment to obtain a judicial decision that the North Carolina law is unconstitutional, it must first obtain, by due process of law, in the District Court a finding that its allegations of the value of its property are true. That finding or conclusion is far ahead of plaintiff. Defendant did not understand that such issue was properly before the three judges and therefore did not offer evidence to them upon the issue it considered under the rulings of the Supreme Court, cited above, properly triable by the District Judge.

If defendant understands plaintiff's contention it is:

"The State law and the administrative order are unconstitutional because they will not allow me to charge for water as much as I think I am entitled to, based upon my *ipsi dixit* of the value of the property used in supplying the water."

Section 266 covers the cases in which a statute or administrative order may be seen upon its face to be violative of the Constitution and not those in which plaintiff is forced to say "if you find the facts to be so and so, the Constitution is violated." Plaintiff is in the position of one trying to use a speaking demurrer, which is not allowable. Plaintiff does not attack the constitutionality of the North Carolina law,

but the correctness of a verdict rendered by the court on a question of fact raised by the plaintiff. Therefore Section 266 has no application.

The *status quo* must continue as it has for 35 years, until plaintiff shows its right, upon a trial on the merits, to change it.

### **Are Not the Contract Prices for Water Controlling?**

Defendant contends (see answer, Sections 8 and 9, page 34 of printed record), based on the language of the town charter and the franchise of plaintiff, that the rates agreed on between the parties in that franchise are controlling.

The authority of the defendant to grant the franchise is the charter found in Private Laws of North Carolina, 1889, chapter 241, Section 24:

“They (the Commissioners of the town) shall have the power to provide water and lights for the said town and to contract for same.”

Section 18 of the franchise of plaintiff, found out of the printed record, reads:

“This ordinance shall become binding as a contract upon said town of Henderson in event the said grantees shall on or before the 16th day of March, 1892, file with the town clerk of said town of Henderson their written acceptance of the terms, obligations, and conditions of this ordinance, and upon the filing of the approved bond, in the sum of \$5,000, for the faithful completion of the said works within the time hereinbefore provided, and thereupon this ordinance shall constitute and become a contract and shall be the measure of the rights and liabilities of said town of Henderson and the said grantees.”

Upon this contract and the authority to make it, defendant cites the following authority:

"Where, however, the public-service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial."

*Southern Iowa Electric Co. vs. Chariton*, 255 U. S., 539.

The recent case of *St. Cloud Pub. Service Company vs. St. Cloud*, 265 U. S., page 355, holds:

"And where a public-service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial."

Citing

*Southern Iowa Elec. Co. vs. Chariton*, 65 L. Ed., 764; 255 U. S., 539;  
*Paducah vs. Paducah R. Co.*, 261 U. S., 267; 67 L. Ed., 647;  
*Georgia R. and Power Co. vs. Decatur*, 262 U. S., 432; 67 L. Ed., 1065.

### **The North Carolina Supreme Court on the Meaning of this Contract.**

It is true that defendant city, when plaintiff's petition for increase of rates was first before the Corporation Commission of the State of North Carolina, and again on appeal in the

Superior and Supreme Courts of the State, took the position that the contract prices were binding for the life of the contract and was each time overruled. (See Corporation Commission *vs.* Water Company, 190 N. C., page 70.) Upon that ruling below the city asked the judge to hold that it was released from all and every obligation and liability under the contract. The judge refused to so hold and the Supreme Court on appeal held (190 N. C., page 74) :

"This proposition of law is not material to this controversy, and is not presented on the record. We do not therefore decide the question presented by this assignment of error."

The City of Henderson contends, on the authority of the Chariton and St. Cloud cases, quoted above, and upon the language of the charter of the city and the contract and the language of Article 1, Section 10, of the U. S. Constitution, prohibiting any State from passing "any law impairing the obligation of contracts," that the rates fixed by this contract cannot be changed during its life; that the power of regulation is suspended during that time.

The City of Henderson further contends that the North Carolina Legislature never intended to confer on the Corporation Commission, nor the State courts on appeal, the right to regulate or change the rates in this case.

The North Carolina Corporation Commission was created by the Legislature in the year 1891. Then and long afterward it was named the Railroad Commission. It was later given its present name and several times its powers were extended. It never had any authority to regulate the rates of the water companies until by chapter 136, Section 1, subsection 3, of the Acts of the Legislature of the year 1917, now in Consolidated Statutes of 1919, Section 2783. The

same Act expressly states, subchapter 1, Section 1, now Consolidated Statutes, Section 2778:

"Nothing in this Act shall operate to repeal any local or special Act relating to cities and towns, but all such acts shall continue in full force and effect and in concurrence herewith unless hereafter repealed.  
\* \* \* The provisions of this Act shall not affect any Act heretofore done, liability incurred or right accrued or vested, etc."

Section 1066 of Consolidated Statutes of North Carolina is the rate-fixing Act prior to that of 1917, and it does not mention water companies. It is plain from C. S. Sections 1098, 1099, and 1101 that the authors of the Act had in mind railroads only.

Defendant submits that it has demonstrated that plaintiff is bound by the contract, until terminated, to furnish water at the contract rates.

If in this we are mistaken, we think the defendant has shown that plaintiff should be required to prove to the District Court by competent evidence that it is entitled to a higher rate before it will be permitted to receive it.

BENNETT HESTER PERRY,  
PERRY & KITTRELL,  
T. T. HICKS & SON,

*Attorneys for the City of Henderson, Appellee.*

HENDERSON, N. C., October 31, 1925.

Service accepted and copy received October 31, 1925.

JAMES H. BRIDGERS,  
*Of Counsel for the Henderson Water Co.*

*Water Rates - See last pg*  
*Utility cannot attack contract rates, as*  
*infringement unless State has consented to change*  
**SUPREME COURT OF THE UNITED STATES.** *the contract*

No. 249.—OCTOBER TERM, 1925.

Henderson Water Company, Appellant,	}	Appeal from the District
<i>vs.</i>		Court of the United
The Corporation Commission of the	}	States for the Eastern
State of North Carolina, Wm. T.		District of North Caro-
Lee, Geo. P. Pell, et al.		lina.

[December 14, 1925.]

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is an appeal under Section 266 of the Judicial Code from an order refusing a temporary injunction heard before three judges. The Henderson Water Company is the owner by assignment of a franchise to furnish to Henderson, North Carolina, a supply of water. The franchise, with a term of forty years, was granted in 1892 by the city, when it was a town, to certain grantees, from whom it came in 1894 to the Water Company, which was complainant below, and is appellant here. The ordinance provided a schedule of prices for water to be furnished beyond which the grantee could not go. Later the State of North Carolina created a Corporation Commission, having power to fix rates for public utilities of the State. 1919 Consol. Stats. of North Carolina, sections 1066, 1097-1103, 2783, 1037.

On September 27, 1922, the complainant filed with the Corporation Commission a petition setting forth the original cost of construction of its plant, the amount expended in permanent improvements, and the earning capacity of the same under the schedule of rates provided in the franchise, and, because of the alleged inadequate return from them, asked the Corporation Commission to grant to it the right to charge rates higher by 10 per cent. The Commission heard the complaint, and March 29, 1923, ordered an increase of about one-half asked for, to take effect July 27, 1923, with the direction that after the Corporation had tried the rates

fixed for six months, it might apply again for such relief as the results would justify.

The end of the six months' test proposed was January 27, 1924. Without applying again to the Commission, the Water Company, on February 22, 1924, filed this bill to enjoin the Commission from continuing to enforce the rates fixed by the order made in the spring of 1923, on the ground that they were confiscatory.

Meantime, the city of Henderson had brought suit against the Commission, to which the Water Company was not a party, to enjoin the Commission from fixing rates different from the rates stipulated in the franchise, on the ground that its contract rights were being violated. In that action the city of Henderson was defeated in the court of first instance, and in the Supreme Court of North Carolina on appeal. *Corporation Commission v. Henderson Water Co.*, 190 N. C. 70. See also *Corporation Commission v. Cannon Mfg. Co.*, 185 N. C. 17, 25; *Southern Public Utilities Co. v. City of Charlotte*, 179 N. C. 151.

The District Court puts refusal to grant the injunction in the present case on the ground that the complainant had not sufficiently exhausted its remedies before the Corporation Commission. We think the District Court was entirely right in this.

It is urged on behalf of the Company that it has a constitutional right to try the question whether it is suffering confiscation and should not be denied that right, even during such a test as six months. It relies on *Oklahoma Natural Gas Company v. Russell*, 261 U. S. 290. In that case a public utility corporation sought an injunction to prevent the enforcement of an alleged confiscatory rate, pending an appeal from the court of first instance in Oklahoma, to the State Supreme Court, in a proceeding in which both the court of first instance and the Supreme Court were exercising the legislative function of fixing rates. The complaint was that plaintiffs were suffering daily from confiscation under the rate to which they were limited by the State Commission, and that even if the State Supreme Court changed the rate thereafter on appeal they would have no adequate remedy for their losses before the Court acted. They had applied to the Supreme Court for a super-seedeas, but it had been denied. This Court held that comity must give way to constitutional right, and that the Gas Company was en-

titled to a hearing on its application for an injunction without awaiting the action of the State Court. In the case of *Prentiss v. The Atlantic Coast Line Company*, 211 U. S. 231, on the other hand, a state commission of Virginia fixed rates for a railway and an appeal was taken under the statute to the Supreme Court of the State which had power legislatively to fix or change rates. A bill was filed by the Railway to restrain the rates fixed by the Commission before the appeal had been perfected and passed on. The Company had made no effort to secure a revision and there had been no present invasion of its rights under the order of the State Commission but only the taking of preliminary steps toward cutting the rates down. So this Court directed the bill in that case to be retained until the result of the appeal to the Supreme Court if the company saw fit to take it.

The present case differs from the cases cited, in that when the Water Company applied to the Corporation Commission for an order increasing rates, it was bound by the terms of a contract with the city contained in its franchise, to furnish water at a low schedule of rates fixed therein. It was not entitled to any judicial relief from this situation, however inadequate the rates. *Columbus Railway Power & Light Company v. Columbus*, 249 U. S. 399; *Public Service Company v. St. Cloud*, 265 U. S. 352. Only by securing the waiver of the franchise rates by order of the Corporation Commission speaking for the State, did the Water Company have any standing to ask for a fixing of rates in excess of the franchise rates. *Trenton v. New Jersey*, 262 U. S. 182. It was, therefore, plainly within the power and discretion of the Commission after granting partial relief to delay further action in the same proceeding until it could satisfy itself by actual trial to what extent its waiver should go. No constitutional rights of the Water Company to be protected against confiscation would be infringed by such reasonable delay.

We concur with the District Court in the view that the Water Company should have applied for a resumption of the hearing after the test and exhausted its remedy there before a resort to this suit.

*Affirmed.*